Starcraft Aerospace, Inc. *and* International Association of Machinists and Aerospace Workers, AFL–CIO. Case 11–CA–20209

April 28, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND KIRSANOW

On July 7, 2004, Administrative Law Judge John H. West issued the attached decision. The Respondent filed exceptions[1] and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to reverse the judge's findings that the Respondent violated Section 8(a)(5), (3), and (1) of the Act, and to adopt the remainder of the judge's rulings,[2] findings,[3] and conclusions only to the extent consistent with this Decision and Order.[4]

I. INTRODUCTION

In reviewing the instant case, we are mindful of the unique facts presented. The Respondent, Starcraft Aerospace, Inc., was a small, family-owned business run by a "hands-on" owner who was intimately involved in all aspects of the Company's operations, particularly new business development. In the months leading to the events at issue, the Respondent was experiencing a dire financial crisis: the Company had incurred an unprecedented series of significant monthly losses, there had been a dramatic drop in new work coming in, and the business was rapidly exhausting its meager line of credit just to meet operational expenses and current payroll. These developments were coupled with the failing health of the Respondent's owner, who was, by the time of the events at issue, bedridden in the late stages of amyotrophic lateral sclerosis (also called ALS or Lou Gehrig's disease), a progressive and fatal neuromuscular illness. It was in the context of these unfortunate circumstances that the events at issue transpired.

II. FACTUAL BACKGROUND

The Respondent, which employed approximately 20 people, was located in Greenville, South Carolina, where it repaired and rebuilt aircraft parts.

In 2003,[5] the Respondent's owner, Larry Riggs, was suffering from ALS. Despite his illness, Riggs continued to work until October 6, when he went home early and never returned. In his absence, Robert Heuschel became the Respondent's general manager.

At the same time that Riggs' health was deteriorating, the finances of the business were also failing. The Respondent had a shortfall of approximately $21,000 in October, and lost approximately $33,000 and $46,000 in the following 2 months.

On November 7, the Union filed a Petition for Certification of Representative with the Board, seeking to represent a group of eight technicians. An election was later scheduled for December 11, 2003.

On November 12, General Manager Robert Heuschel, Maintenance Manager Harvey Cash, and Business Manager Janine Fiorito ("the management team") met with Riggs and his wife, Patricia, at their home. The purpose of the meeting was to discuss whether, given the Respondent's failing financial condition, the business could continue to operate, and whether the employees should be laid off. The participants discussed Riggs's failing health and whether the family wanted to sell the Company. The management team also indicated that the Respondent would need a significant infusion of money in order to be in a position to begin work on a $12-million refueling probe contract the Company won in September.

On November 17, the Respondent distributed a letter to its employees from the management team. The letter stated that Riggs was "saddened" to hear of the petition for election and that "[he], his family and all of the management" were "strongly opposed" to the employees joining a union.

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[1] No exceptions were filed to the judge's findings that the Respondent violated Sec. 8(a)(1) by interrogating an employee about his union activities, by threatening employees that the Respondent's lease would be terminated if the employees selected the Union as their representative, by threatening employees with loss of business if the employees selected the Union as their representative, and by threatening employees with job loss if they selected the Union as their representative. Also, there were no exceptions filed to the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(5), (3), and (1) when it unilaterally discontinued the company Christmas party.

[2] We find that the judge properly denied the Respondent's motion to reopen the record to permit the introduction of evidence concerning the death of Owner Larry Riggs and the closing of the Respondent's business. See *Pacific Bell*, 330 NLRB 271, 271 fn. 1 (1999); *Modern Drop Forge Co.*, 326 NLRB 1335, 1335 fn. 1 (1998). In any event, in view of our decision, the issue is moot.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). As discussed below, we reverse the judge's credibility findings to the extent they are inconsistent with this decision.

[4] Member Kirsanow concurs in the result.

[5] Unless otherwise indicated, all dates hereafter refer to 2003.

The management team met again with the Riggses at their home on November 21. They rehashed the issues discussed at the November 12 meeting, but reached no final decisions on how to proceed.

On December 1, the management team met with Dan Collins, a lawyer who previously handled estate and corporate matters for the Riggses.[6] Also in attendance was Melvin Hutson, a labor lawyer, who Collins had called in to represent the Company with respect to the labor issues implicated by the upcoming union election and impending cessation of business by the Respondent.[7] At this meeting, the Respondent's management team gave Collins a typed statement, which included a recommendation that the Riggs family sell the Company.

One week later, on December 8, this group met again, this time joined by Patricia Riggs. During the meeting, Patricia Riggs announced that she and her husband had decided to sell the Company. She made clear that no additional money would be invested in the Company, and that she did not want the Company to borrow further or incur additional debt. However, she did consent to the Company drawing $25,000 from its existing line of credit in order to cover current payroll obligations and the Respondent's bills.

In addition, the management team, Patricia Riggs, and Hutson discussed laying off employees. Heuschel testified that "Mrs. Riggs announced [the Riggses'] decision to sell the company and to lay off employees." Cash testified that, at this meeting, "Mrs. Riggs instructed us to lay off the staff and to prepare the company for closure or sale." Fiorito testified that, "at that particular meeting," Patricia Riggs "said that she wanted to do lay offs. . . ." Although not mentioned by the judge, Heuschel explained that the decision to conduct the layoff "was made by Mr. and Mrs. Riggs prior to that meeting,"[8] and Cash said that "the decision had already been made prior to" the election.

The management team, Patricia Riggs, and Hutson also discussed the timing and scope of the layoff. Although a specific date was not chosen, both Heuschel and Cash testified that Patricia Riggs' instruction was to conduct the layoff "as soon as possible." Each member of the management team testified that Hutson advised them that, if the layoff occurred prior to the election, then it could be construed as a "threat" or an "unfair labor practice."[9] According to Fiorito, "[I]f the lay-off was performed before the vote, it could be perceived as an unfair labor practice, and the managers were trying to do the best possible thing based on a recommendation from counsel." Fiorito also testified that Patricia Riggs said that the layoffs would be "across the board," "including [Riggs'] daughter and granddaughter."

Collins corroborated much of the management team's testimony about the December 8 meeting. He testified that Patricia Riggs communicated a decision to sell the Company and that there was a discussion that a layoff was necessary "simply because there just wasn't enough money to make the payroll." Collins also testified that "[he did] not recall a decision being made at that [meeting] to lay-off any one or more people." He said that, while he "remembere[d] the discussion about it," he "just [had no] recollection of anything that specific." However, Fiorito's undisputed testimony is that Collins was not present for the entire meeting: "[T]here was a few times that we were in his office that he would leave us to discuss certain things with the business. He would just let us use his board room and he would step out, and conduct his business then come back in." She specified that Collins "was not witness to everything that was discussed at [the December 8] meeting."

On December 11, the election was held. A majority of the unit of Respondent's technicians voted to be represented by the Union.

The next morning, Heuschel wrote a letter informing the Respondent's employees that, effective immediately, all personnel were "furloughed" until January 5, 2004. The letter also informed the employees of the Company's "significant financial crisis," explaining that "[o]ur receivables have been at a record and unprecedented low for many months, and we are faced with the need to start borrowing against credit to meet our basic expenses and payroll." Also, the letter notified the employees that the Respondent planned "for work at Starcraft Aerospace, Inc. to resume at 8:00 am on 05 January 2004. You will be notified of any changes to these plans." Larry Riggs signed the letter.

[6] It was because of this earlier representation of the Riggses that Heuschel contacted Collins.

[7] Regarding the scope of Collins's representation of the Respondent, the following colloquy occurred:

> Q. Were you a participant, either as a legal adviser or a business adviser or just part of a meeting, in any discussions concerning when, where and who to lay off?
>
> A. No and I think I can truthfully say that not knowing any labor law, we would not have advised about that. I think when we were told that there was a Union issue, we called [Hutson]; and that's not to pass the buck. That's just to say, we would not have been competent to advise in that area and would not have.

[8] In his affidavit, Heuschel testified that he "[did not] recall a particular meeting where it was decided to conduct the layoff," and that he "[did not] remember the exact date when it was decided to conduct the layoff."

[9] Heuschel's affidavit is consistent with this testimony.

That afternoon, Heuschel called the Respondent's employees together, read the letter, and distributed a copy to each employee. Heuschel explained that he decided that the layoff would occur on December 12 because "that was as soon as possible. That was as soon as we could not have an affect on, or possible threat to the employees because the election was over then." On cross-examination, Heuschel reiterated the layoff occurred on December 12 because that was "as soon as possible": "I could have laid them off a minute after the election but that is impractical."

Over the next 2 months, the Respondent recalled several of the furloughed unit employees (Tony Raper, David Marion Nelson, Harvey Cash, Trey Elzy, Albert Kamradt, Gary Lyles, and John Rabon) on a part-time basis, in order to perform work already onsite from existing contracts. Rabon declined the Respondent's offer of part-time reinstatement.

By letter dated December 29, the Respondent notified furloughed unit employees Erik Hoekstra, Elmo Blackman, and Rabon that they had been indefinitely laid off. Heuschel testified that he extended the layoff "because the financial status of the company had not improved [since the layoff], and the initial lay-off notice had everybody coming back on [January] 5th." According to Heuschel, he did not expect the financial status of the Company to improve during the interim: "[T]here wasn't any magic pile of money anywhere that was going to improve the situation of the company."

III. THE JUDGE'S DECISION

On the foregoing facts, the General Counsel issued a complaint alleging, among other things, that the Respondent discriminatorily laid off unit employees and that it did so "without prior notification to or consultation with the Union concerning *the decision to lay off* said employees" (emphasis added). The judge concluded that the Respondent violated Section 8(a)(3) and (1) by discriminatorily laying off the employees. In addition, the judge found that the Respondent violated Section 8(a)(5) and (1) by temporarily and then permanently laying off employees without first giving the Union notice and an opportunity to bargain.[10]

The judge based these findings on two fundamental conclusions: first, that the Respondent's decision to lay off employees was made *after* the election; second, that the layoffs were not the result of economic necessity, but rather were made in retaliation for the employees having elected the Union as their collective-bargaining representative.

IV. ANALYSIS

Contrary to the judge, we find that the Riggses made the decision to lay off the employees prior to the election. We further find that they based their decision on the exigent circumstances of Riggs' terminal medical condition and the increasingly poor financial condition of the business, not antiunion animus. Accordingly, we reverse the judge's finding that the Respondent violated Section 8(a)(5), (3), and (1) by laying off the employees.

A. Section 8(a)(5) and (1)

We find the Respondent did not violate Section 8(a)(5) and (1) of the Act by laying off the unit employees. In general, an employer violates Section 8(a)(5) and (1) by unilaterally implementing changes in the terms and conditions of employment of its represented employees without satisfying its bargaining obligation. If, however, an employer makes a decision to implement a change *before* being obligated to bargain with the union, the employer "does not violate Section 8(a)(5) by its later implementation of that change."[11] *SGS Control Services*, 334 NLRB 858, 861 (2001); accord: *Consolidated Printers, Inc.*, 305 NLRB 1061 fn. 2, 1067 (1992). Contrary to the judge, we find that the record shows that a firm decision to lay off the employees "as soon as possible" was made prior to the December 11 election.

As discussed above and in detail in the judge's decision, the Respondent was in significant financial trouble in the fall of 2003. The business had been losing money for some time. Furthermore, the prospects for financial recovery were bleak due to Riggs' rapidly failing health. In fact, by the time of the layoffs, Riggs' health was so poor that he was no longer able to go to the workplace or attend business meetings concerning the future of the Company. Because Riggs was unavailable, his wife, Patricia, stepped in to serve as his proxy.

The record establishes that by December 8, following several meetings with the Respondent's management team at which the Company's declining fortunes were discussed, Larry and Patricia Riggs made a firm decision to cease operations, to stop financing the failing business, and to lay off the employees.[12] The unrebutted testimony

[10] The "temporary" layoff is the furlough of December 12. The "permanent" layoff is the layoff of December 29. As used herein, the term "layoff" refers to both.

[11] It is the Respondent's burden to show that the decision was so privileged. See, e.g., *Fresno Bee*, 339 NLRB 1214 (2003). But cf. *SGS Control Services*, supra at 861 (stipulated facts established that decision was made before election).

[12] As set forth in *Consolidated Printing*, supra, it is not essential that the precise date of the decision be established. 305 NLRB at 1061 fn. 2. The critical fact is whether the Respondent's decision predated the election. *SGS Control Services*, supra at 861 fn. 3.

of Heuschel, of Cash, and of Fiorito supports this conclusion. Heuschel and Cash testified that, at the December 8 meeting, Patricia Riggs announced a decision previously reached by her and her husband to sell the business and to lay off the employees. According to Fiorito, Patricia Riggs stated that she was unwilling to incur any additional debt, wanted to sell the Company, and wanted to proceed with the layoffs. Pursuant to that decision, Patricia Riggs instructed the management team to conduct the "across the board" layoff "as soon as possible." During the meeting, however, Hutson, the Respondent's labor counsel, advised that if any layoffs occurred before the scheduled vote, such action might be considered a threat and could result in the filing of unfair labor practice charges. Consequently, while the decision to lay off employees was made prior to the election, on the advice of counsel, the layoff was not to be implemented until after the election.

We recognize that, prior to the election, Fiorito told employees that "[m]any local and national companies are closing, laying off employees, or just not hiring any new workers. Starcraft Aerospace has continued to grow during this period although maybe not as quickly as some people had hoped." Fiorito also said, "Starcraft [gave] its employees an across the board 3% cost of living raise this summer at a time when many in the workforce did not get any raises at all. Starcraft Aerospace is reevaluating its pay scales and hopes to offer its employees another pay raise in the early part of the upcoming New Year." Fiorito's statements did not accurately reflect the true financial condition of the Company. Fiorito's sworn testimony, as well as supporting documentary evidence, establishes that the Company's financial health was in dire straits and rapidly deteriorating in November. Moreover, the testimony of Fiorito, Heuschel, and Cash establishes that the Riggses made the layoff decision prior to the December 11 election.

The judge's contrary finding that the decision to conduct a layoff was not made until December 12 is based on a flawed analysis of the testimony. The judge failed to acknowledge the uncontradicted testimony that the decision to lay off was made *prior to* the meeting of December 8, and was announced on that date. Because the judge's decision makes no reference to this crucial testimony, his credibility resolutions do not reach this specific testimony.

To the extent the judge's credibility resolutions could be construed to discredit the testimony that the Riggses reached their decision prior to the December 8 meeting, such a construction is likewise based on a misapprehension of the relevant testimony. None of the reasons the judge articulates for discrediting Heuschel and Cash is based upon their demeanor as witnesses. Our policy, as enunciated in *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951), is to attach great weight to a judge's credibility findings insofar as they are based on demeanor. However, to the extent that credibility findings are based upon factors other than demeanor, as in the instant case, the Board itself may proceed with an independent evaluation. *Canteen Corp.*, 202 NLRB 767, 769 (1973) (citing *Valley Steel Products Co.*, 111 NLRB 1338 (1955)). Further, even if the policy of *Standard Dry Wall* extends to credibility resolutions based on factors other than demeanor, we find, on the basis set forth below, that the clear preponderance of the evidence is contrary to the judge's credibility resolutions discussed herein.

On the facts of this case, our evaluation leads us to conclude that the judge's credibility findings regarding Heuschel must be reversed. Contrary to what the judge's decision implies, Heuschel's testimony that Patricia Riggs announced a previously-reached decision to conduct the layoff is consistent with his sworn statement that he did not "recall a particular meeting" or "remember the exact date" "when it was decided to conduct the layoff." As he testified, he was not present when the Riggses made their decision, only when Patricia Riggs announced it. Unlike the judge, we are not troubled by Collins' failure to corroborate Heuschel's testimony: first, Fiorito, whose testimony the judge credited, testified without contradiction that Collins was not present for the entire meeting on December 8; second, Collins testified that he did not represent the Respondent with respect to its labor issues. As such, it is not surprising that Collins had no "recollection of anything that specific" about the layoffs. For these reasons, we find that the judge improperly discredited Heuschel.

The judge's credibility findings regarding Cash are similarly flawed. The judge articulated two reasons for discrediting Cash: "notwithstanding [Cash's] assertion that [Patricia] Riggs was acting on advice of counsel, her counsel did not testify that he advised and [she] decided on December 8, 2003 to have a layoff"; and Heuschel did not corroborate Cash's testimony that "the decision when to layoff employees was made by Heuschel." First, the judge's concern about Cash's statement that Patricia Riggs acted on "the advice of her counsel" when she instructed the management team to conduct the layoff is misplaced. Both Fiorito and Heuschel (twice) corroborated Cash's testimony that Hutson advised on December 8 that the layoff not take place until after the election for fear of unfair labor practice charges. There is nothing in Cash's testimony to suggest that he referred to some different advice of counsel. Second, despite the judge's

statement to the contrary, Heuschel explicitly corroborated Cash's testimony that Heuschel made "the decision *when* to lay off the employees":[13] Patricia Riggs instructed the management team to conduct the layoff "as soon as possible"; Heuschel decided, following Hutson's advice that the layoff not precede the election, that December 12 was "as soon as possible."

Finally, the judge's discrediting of testimony that Patricia Riggs announced the decision on December 8 was based in part on his "opinion" that she had no authority to make such a decision. However, the testimony was that the Riggses made the decision prior to December 8. Clearly, Patricia Riggs had the authority to announce the decision. Thus, a fundamental premise for the judge's discrediting of testimony does not exist.

In finding that the decision to conduct the layoff did not occur until December 12, the date Riggs signed the letter announcing the layoffs to the employees, the judge relied primarily on the fact that, in his opinion, such a decision "was still Larry Riggs's sole prerogative." According to the judge, since there was no testimony as to the scope of Patricia Riggs' power of attorney, it was not clear that Patricia Riggs had the authority to decide to lay off the Respondent's employees. As we have explained, the uncontradicted testimony is that Larry and Patricia Riggs together made the decision to conduct the layoff. Although Riggs was not present at the meeting where the decision was announced, we do not share the judge's concern over the technical legal parameters of Patricia Riggs' power of attorney to act on behalf of her husband. It is clear that Patricia Riggs was acting as his eyes and ears, and served as his proxy at this meeting. The General Counsel presented no evidence that Patricia Riggs lacked the authority to either make or convey the decision to cease operating the business and to lay off the employees, and no witness even suggested such a limitation.

In sum, we find that the Respondent made a firm decision, prior to the election, to lay off the employees as soon after the election as possible. Its implementation of that decision, after the election did not violate Section 8(a)(5) and (1).[14]

[13] Under the circumstances presented here, this is distinct from the decision to lay off the employees.

[14] There is no basis for finding that the Respondent's extension of the layoff from temporary to indefinite violated Sec. 8(a)(5). Such an extension was contemplated by the preelection decision memorialized in the December 12 letter: employees were informed that changes to duration of the layoff were possible, and that they "w[ould] be notified of any changes to the[] plans." As such, the December 29 extension of the layoff was an effect of the preelection decision, and not subject to a decisional-bargaining obligation. The General Counsel does not allege a failure to bargain about the effects of the decision to layoff.

B. Section 8(a)(3) and (1)

For similar reasons, and contrary to the judge, we find that the Respondent's decision to lay off the employees did not violate Section 8(a)(3) and (1). Using the analytical framework set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), we find that, even if the General Counsel met its initial burden of establishing antiunion animus as a motivating factor in the layoffs, the Respondent clearly established that, given its dire economic circumstances, it would have undertaken the layoffs even in the absence of the employees' election of the Union. It is undisputed that the Respondent was losing money in the period leading up to the layoffs. In fact, the Respondent was operating at such a deficit that it was required to borrow $25,000 in the beginning of December in order to meet its payroll. This amount was insufficient to cover even 1 month's operation expenses or to make up for any of the 3 months of shortfall the Respondent had just suffered; it brought the Respondent to within $10,000 of its credit limit. Moreover, Riggs himself had personally guaranteed this line of credit. As such, it is not surprising that, as a dying man, he would not want to take on further debt. Given the Respondent's dire financial situation, including its inability to meet payroll without borrowing money, it is clear that the layoffs were economically motivated and would have occurred even in the absence of any antiunion animus.

In reaching a contrary finding, the judge relies in part on his finding that the Respondent had found itself in economic trouble before and had not resorted to layoffs. This reasoning, however, fails to recognize that the Respondent's financial difficulties in the fall of 2003 were different from its prior financial difficulties: Larry Riggs, the individual primarily responsible for the ongoing viability of the enterprise, was dying and was no longer able to participate in the operations of the business.

Similarly, the judge's emphasis on the Respondent's ongoing operations following the layoffs as evidence of its financial viability is not persuasive. The record establishes that, following the layoffs, the Respondent continued its operations only insofar as it worked to complete work on existing contracts. An employer's efforts to complete customer work in progress, even after a decision to close its business has been made, does not undermine a finding that the employer made an economically-motivated decision to lay off employees.

Accordingly, we find that the Respondent's decision to lay off its employees did not violate Section 8(a)(3) and (1) of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, Starcraft Aerospace, Inc., Greenville, South Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their union activities.

(b) Threatening employees by informing them that the Employer's lease would be terminated if the employees selected the Union as their collective-bargaining representative.

(c) Threatening employees with loss of business if the employees selected the Union as their collective-bargaining representative.

(d) Threatening employees with job loss if the employees selected the Union as their collective-bargaining representative.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its Greenville, South Carolina facility copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 2003.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. April 28, 2006

Robert J. Battista, Chairman

Peter C. Schaumber, Member

Peter N. Kirsanow, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interrogate you about your union activities.

WE WILL NOT threaten you by telling you that our lease would be terminated if you select International Association of Machnists and Aerospace Workers, AFL–CIO as your collective-bargaining representative.

WE WILL NOT threaten you will loss of business if you select International Association of Machnists and Aerospace Workers, AFL–CIO as your collective-bargaining representative.

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States court of appeals enforcing an Order of the National Labor Relations Board."

WE WILL NOT threaten you with job loss if you select International Association of Machnists and Aerospace Workers, AFL–CIO as your collective-bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

STARCRAFT AEROSPACE, INC.

Jasper C. Brown Jr. Esq., for the General Counsel.
Melvin Hutson, Esq., of Greenville, South Carolina, for the Respondent.

DECISION

STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge. A charge was filed by the International Association of Machinists and Aerospace Workers, AFL–CIO (the Union or the Charging Party) against Starcraft Aerospace, Inc. (Respondent or Starcraft) on December 16, 2003, which charge was amended on January 6 and February 26, 2004. On March 24, 2004, a complaint was issued which alleges that Respondent (1) violated Section 8(a)(1) of the National Labor Relations Act (the Act), by (a) in late November early December 2003 interrogating its employees about their union activities; (b) in mid-November 2003 threatening its employees with plant closure if the employees selected the Union as their collective-bargaining representative; (c) in mid- and late November and early December 2003 threatening its employees by informing them that Starcraft's lease would be terminated if the employees selected the Union as their collective-bargaining representative; (d) in mid- and late November and early December 2003 threatening its employees with loss of business if they selected the Union as their collective-bargaining representative; (e) in early December 2003 threatening its employees with job loss if the employees selected the Union as their collective-bargaining representative;[1] (f) on December 12, 2003, canceling its 2003 Christmas party; (g) on December 12, 2003, and January 5 and 12, 2004, temporarily laying off named employees; (h) on December 29, 2003, laying off and thereafter failing and refusing to reinstate three named employees; (2) violated Section 8(a)(3) of the Act with the aforementioned cancellation of the 2003 Christmas party and the layoffs; and (3) violated Section 8(a)(5) of the Act by commencing on or about December 11, 2003, and at all times thereafter refusing and continuing to refuse to bargain collectively with the Union as the exclusive collective bargaining of all employees in the involved unit;[2] in that Respondent (a) on or about December 12, 2003, unilaterally canceled its annual employee Christmas party without prior notification to or consultation with the Union; (b) on or about December 12, 2003, and January 5 and 12, 2004, unilaterally conducted the aforementioned temporary layoff without prior notification to or consultation with the Union concerning the decision to temporarily lay off the employees; and (c) on December 29, 2003, unilaterally laid off certain of its employees without prior notification to or consultation with the Union concerning the decision to lay off the employees. The Respondent denies violating the Act as alleged.

A trial was held in this matter on April 26 and 27, 2004, in Greenville, South Carolina. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a South Carolina corporation, with a facility located in Greenville, is engaged in the business of repairing and rebuilding aircraft parts, and in conducting its business operations it has purchased and received at its Greenville facility, goods and materials valued in excess of $50,000 directly from points outside of the State of South Carolina. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and the Union at all material times has been a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Janine Fiorito was hired by the Respondent in October 1999 to help with its QuickBooks computer accounting program. Subsequently, Fiorito became Respondent's business manager. Fiorito testified that within her first 2 weeks of working for Owner Larry Riggs she told him that she had major financial concerns about the way he ran the business; that she was amazed that the Company did not have sufficient backup financial capital; that Larry Riggs told her that is why he had a revolving line of credit; that Larry Riggs used credit cards to finance company needs and he was paying interest on the money that he was borrowing; that Larry Riggs also used invoice loans, that is, he borrowed money on his invoice to meet cash flow problems; that in 2003 when the Larry Riggs became ill with amyotrophic lateral sclerosis (Lou Gehrig's disease or ALS), the business was put under a great deal of stress; that the Respondent has to invoice out approximately $90,000 to $100,000 a month gross to meet the financial demands of the Company; and that starting in the second calendar quarter of 2003 the Respondent was not meeting the financial demands of the Company.

According to his testimony, in 2002 while he was an employee of the Respondent, Harvey Cash asked Larry Riggs if he was interested in selling the Company. Cash testified that he told Respondent's employee Tony Raper about his conversation with Larry Riggs.

Respondent's former employee Trey Elzy testified that then employee Cash started the union campaign when he contacted Wayne Camp of the Union around the end of the summer 2003.

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[1] Counsel for General Counsel's motion to withdraw par. 8(f) of the complaint was granted at the end of the trial herein.

[2] The following employees of Respondent constitute the involved unit:

> All full-time and regular part-time technicians employed by Respondent at its Greenville, South Carolina, facility, excluding all other employees, office clerical employees and professional employees, guards and supervisors as defined in the Act.

Cash testified that he contacted Union Representative Camp in July 2003, asked him what the Union could do, told Camp that he did not believe that the Union could help Respondent's employees in their current situation, and he did not contact Camp again; and that Trey Elzy and Tony Raper were aware of the call because he asked their opinions regarding whether they thought the Union might benefit Respondent's employees.

In the fall of 2003, the Respondent's owner, Larry Riggs, became too ill to come to work. Robert Heuschel became the general manager of the Respondent.

In September 2003, Cash became Respondent's maintenance manager, he no longer promoted the Union, and according to the testimony of Elzy, Cash was then against the Union.

At an all hands (employees) meeting on September 11, 2003, Elzy stood up and asked a number of questions about the Company's future, indicating that (1) 50 percent or more of the Company's personnel are in nonmoney making jobs; (2) the Company had no new contracts in over 2 years; (3) employee morale was low probably because of the lack of work; and (4) he had no trust in management. Elzy then asked how close the Company was to closing the door by which he meant shutting down. Elzy testified that his comments were directed to Heuschel and not Larry Riggs, who was present at this meeting.

According to the minutes of the meeting (GC Exh. 12), on September 24, 2003, at an all hands meeting, Heuschel, as here pertinent

> announced that Starcraft Aerospace, Inc. has been sent the Refueling Probe Contract by the government representative to examine and sign. Once signed and accepted, it will award a seven-year, $12,706,772 . . . contract to Starcraft to overhaul the Probe Assemblies. This award is due to the culmination of hard work of many individuals at Starcraft Aerospace, Inc. Congratulations to the company, as the award of this contract may be the first step in the expansion and development of the company.

Elzy testified that Heuschel or Cash said that the Company could borrow from the estimated amount of the contract to get money to keep going for a while. On cross-examination, Elzy testified that the warehouse was cleared out to get ready for the probes which were to come in 9 months to a year later; and that he still had concerns about whether the Company was going to continue in business up until the time of the union election described below. Respondent's employee John Rabon testified that Heuschel told the employees that this was going to help the Company be able to get either other contracts or other equipment to be able to do more work.

Heuschel testified that the refueling probe contract was signed in the fall of 2003, it was expected that the work on the first purchase order under the contract was to begin shortly after the contract was signed, but it was some time before the Respondent received the first purchase order. On cross-examination, Heuschel testified that General Counsel's Exhibit 19 is the probe refueling contract; that the contract was signed in September 2003 by Larry Riggs; that the contract is for $12,706,772; and that the term of the contract is 7 years, namely October 1, 2003, to September 30, 2010.

On October 23, 2003, Rabon met with Heuschel about being a computer person. Rabon testified on cross-examination that he has complained about not having enough work to do; that at this meeting Heuschel told him that he could help out in other areas, including researching changes that he was complaining about or he could be laid off; and that he probably did not have anything to work on at the time but he probably could have worked on something else. On redirect, Rabon testified that he did not recall Heuschel ever telling him that he could or should take a lay off. Subsequently Rabon testified that on or about October 23, 2003, there probably was a day or two when he did not have something to work on.

On October 24, 2003 James Payne, an organizer for the Union, met with Elzy, Raper, and Rabon. Payne testified that the employees filed a Petition for Recognition that same day.

On October 27, 2003, according to the testimony of Payne, the Union received the support of additional employees, namely, Albert Kamradt, Erik Hoekstra, Elmo Blackman, and Keith Thomas.

On November 7, 2003, a Petition for Certification of Representative was filed. (GC Exh. 2.)

On or about November 12, 2003, Elzy, along with all of the Respondent's employees, attended a meeting at the plant where the overall status of the Company's financial position was discussed by a supervisor. Elzy testified that Fiorito spoke about the state of the Company, indicating that certain things were stronger than a lot of companies, the Respondent had never had a layoff and did not plan on having a layoff, the Company gave its employees a raise earlier in the summer and anticipated a raise at the beginning of the year; and that minutes of this meeting were taken and he looked at the minutes (GC Exh. 9). As here pertinent, the minutes read as follows:

> * Janine reviewed the past years benefits.
>
> Each employee was recently given a benefit handbook. This covered such things as our Cafeteria Plan, Health Insurance, and Dental Insurance. Any updates on benefits are handed out to all employees on a continuing basis throughout the year.
>
> Health Insurance problems have been in the news these past few years. What to do about the ever increasing cost of Health care. This year's increase for Health Insurance was an amazing 31%. Other small companies are dropping this benefit or raising their employees' contribution. Starcraft Aerospace absorbed most of this year's Health Insurance costs instead of passing the increase along to its employees.
>
> Starcraft also offers its employees a good quality dental plan at a minimal expense to its full[-]time workers. Our Cafeteria Plan is beneficial to the employees allowing their insurance costs to come out of their paychecks on a pre-taxed basis, meaning more take home pay.
>
> Many local and National companies are closing, laying off employees, or just not hiring any new workers. Starcraft Aerospace has continued to grow during this period although maybe not as quickly as some people had hoped. For a small company, employing less than 20 people currently, Starcraft has offered benefits that many larger

> companies have not been able to offer their employees during the past few years. Starcraft did give its employees an across the board 3% cost of living raise this summer at a time when many in the work force did not get any raises at all. Starcraft Aerospace is reevaluating its pay scales and hopes to offer its employees another pay raise in the early part of the upcoming New Year.

Rabon testified that he attended this meeting; and that Fiorito said that the Company was fairly stable, it was not having layoffs like other companies, the Company was doing fairly, it had just given a 3-percent raise, and it increased the employees' medical benefits. Kamradt testified that Fiorito spoke about a pay raise and medical benefits but he did not remember her saying anything about a financial crisis.

Fiorito testified that to the best of her recollection she never told employees that the Company was in good financial shape.

Also on November 12, 2003, Heuschel attended a meeting at Riggs' house. In addition to Heuschel, those present included Larry Riggs and his wife Patricia, Cash, and Fiorito. Heuschel testified that the purpose of the meeting was to discuss the future of the Company, the failing financial situation of the Company, whether to sell it, whether employees should be laid off, what was the Company worth, how could the Company pay off all of its debt, there was no money to run the Company, the lack of business, the health of the owner, and whether to lay off the owner's daughter and granddaughter.

Cash testified that the subject of the November 12, 2003 meeting at the Riggs' residence was management's serious concern with the Company's financial well being and the ability of the Company to continue on with business; that he, Heuschel, and Fiorito brought up the fact that the Company needed a huge sum of money infused into it to prepare for servicing the upcoming refueling probe contract; and that in view of Larry Riggs failing health, whether the Riggs wanted to sell the Company.

On November 17, 2003, a stipulation (GC Exh. 3) was entered into by the parties. The stipulation described the unit as follows: all full-time and regular part-time technicians employed by the Employer at its Greenville, South Carolina facility, but excluding all other employees, office clerical employees and professional employees, guards and supervisors as defined in the Act.

Also by notice signed by Heuschel, Cash, and Fiorito, dated November 17, 2003 (GC Exh. 18), Respondent's employees were advised as follows:

> Starcraft Aerospace, Inc. has received a petition for a union election from the National Labor Relations Board. That means that a union, in this case the International Association of Machinists and Aerospace Workers, AFL–CIO, is seeking to organize some of the employees here. It also means that at least 30 percent of the employees in the group have authorized this union to petition for this election. As a result a secret ballot election will be conducted next month among the employees in this group.
>
> The group involved is all Technicians. *No other employees will be eligible to vote.* The outcome will be determined by a majority vote of those who cast a vote. A notice will be posted as of the date, time and place of the election.
>
> This development is a surprise and a disappointment to the Company.
>
> In 1993 Larry Riggs established Starcraft Aerospace, Inc. with the intent of employing qualified people, offering them pleasant working conditions and providing them with good benefits. He has accomplished these goals. Even during the difficult periods such as the aftermath of 9–11 and the current slow time, he has managed to avoid layoffs and continued to offer benefits. At a time when many other area businesses are cutting benefits, and not giving any raises, Larry has provided his workers with a cost of living raise and he has absorbed most of the recent increase of their Health Insurance costs.
>
> Much time and money has already been spent by this company to research the ramifications of this action. These company resources could have [been] better spent trying to get more work into the company or used to address many of the other pressing issues currently facing the company. There are legal restrictions on what Larry and the three of us that the law classifies as supervisors or managers can say or do concerning this petition. We do not like this idea of splitting employees and management into opposing groups, and we would prefer to see us all work as a team toward common goals. However, we are free to communicate the facts and express our opinions. We feel a union will *not* significantly offer the technicians better labor benefits and *will* put undue strain on the company's employment and financial resources.
>
> Larry is very saddened to hear of this issue. Larry, his family and all of the management of Starcraft Aerospace, Inc. are *strongly opposed* to allowing a union being imposed on this company. [Emphasis in original.]

On November 21, 2003, there was another meeting at the Riggs' house. According to the testimony of Heuschel, the same subjects which were discussed at the November 12, 2003 meeting were discussed again, without resolution. Heuschel also testified that Larry Riggs said that he did not want to keep spending more money on the Company.

Cash testified that the same subjects discussed on November 12, 2003, were discussed on November 21, 2003; and that he, Heuschel, and Fiorito recommended that Patricia Riggs contact their attorney to go over the options to determine if it would be beneficial for them to sell the Company.

Cash testified on cross-examination that in November 2003 he was sure he may have told Raper that he was interested in buying the Company.

According to the testimony of Elzy, in late November or early December 2003 Supervisor Cash came into Elzy's work area and asked him if his feelings for the Union were still the same; that just he and Cash were present; that he told Cash that his feelings for the Union were the same; that he asked Cash how were his feelings for the Union; that Cash responded that he was not a union supporter anymore because Donaldson Center had informed him that if Starcraft went union, Donaldson Center would revoke Starcraft's lease; that Cash said that they

had talked the lease matter over with their lawyers and the lawyers agreed with that; and that Cash also said that Lockheed Martin would terminate all of Respondent's contracts if Starcraft went Union. On cross-examination, Elzy testified that he did not get involved with the Union until after Cash became part of management.

Cash testified that he did not recall questioning Elzy about his support of the Union. On cross-examination, Cash testified that he believed that he recalled Elzy asking him what he thought about the Union; that he told Elzy that he was now on the other side of the fence and he no longer supported the Union; that he did not recall mentioning the Donnellson (referred to elsewhere in the transcript as Donaldson) Center or Lockheed during this conversation;[3] that there had been some conversation with Elzy back in September about Lockheed regarding some of the Respondent's contracts; and that he did not believe that he told Elzy that if Lockheed found out about the Union it could terminate its contract with the Respondent because counsel had advised him not to make statements that could be construed as a threat.

On December 1, 2003, Heuschel attended a meeting at the Riggs' business attorney's office. In addition to Heuschel, those present included the Riggs' business attorney, Dan Collins, Attorney Melvin Hutson, Fiorito, and Cash. Neither Larry nor Patricia Riggs could attend the meeting. The subjects discussed at the November 12 and 21, 2003 meetings were rehashed but no decisions were made because the Riggs were not at the meeting.

Collins, who is certified specialist in probate, estate planning, and trust law, and does some related business and corporate work, testified that he had been contacted by Heuschel, Cash, or Fiorito regarding the viability, the financial stability of the Company, and he met with these three supervisors on December 1, 2003.

Fiorito testified that in October 2003 the Respondent had its first major month of a shortfall, followed by a shortfall of $34,000 in November 2003, and in the beginning of December 2003 the Respondent was on track for another major loss; that she had never experienced such major losses for 3 months straight while she worked for the Respondent; that there was also a unprecedented dramatic drop in the work coming in; that layoffs as an option were discussed at the December 1, 2003 meeting in Collin's office and before that at the November 12 and 21, 2003 meetings at Larry and Patricia Riggs house; that Respondent had a revolving line of credit with Carolina First with a ceiling of $135,000; and that the first week in December 2003 the Respondent continued to borrow from the credit line transferring $25,000 from the line of credit to its checking account. On redirect, Fiorito sponsored Respondent's Exhibit 7 which is a typed statement Respondent's management team gave to Collins on December 1, 2003. The statement includes the following: "Therefore, it is our opinion that it is in the best interests of the Riggs family to sell the Starcraft Aerospace Corporation."

[3] Cash also testified that he did not believe that he told Raper about the Donnellson Center terminating the lease or Lockheed terminating its contract with the Respondent.

According to the testimony of Rabon, about a week before the election all of the employees were given a letter from Riggs (GC Exh. 16), which, as here pertinent, reads as follows:

> Many of you have been around long enough to benefit from the growth and success of Starcraft. We are working on positive changes to make the Company stronger and more competitive. I would appreciate your continued support and faith in the Company. Please help me by voting no to a union.

On December 8, 2003, Heuschel attended a meeting at Collins' office. In addition to Heuschel, those present included Collins, Hutson, Patricia Riggs, Fiorito, and Cash. Because of another commitment, Hutson had to leave before the meeting was over. According to the testimony of Heuschel, Patricia Riggs announced that she and her husband decided to sell the Company and to lay off the employees as soon as they could after the election. Heuschel testified that the subjects discussed at the prior meetings were discussed again; that the value of the business was discussed, along with the value of the contracts, which Patricia Riggs knew nothing about; that other things discussed included the financial situation of the Company; that the employees were not laid off on December 8, 2003, because a layoff before the election could be considered a threat and result in an unfair labor practice charge; that during the week beginning December 8, 2003, the Company was in an extremely poor financial situation, the bank account and the money market were extremely low, and the Company, which had very little business, had no future; that twice in December 2003 $10,000 was transferred from the money market account into the checking account; that around December 10, 2003, the Company borrowed $25,000 from a line of credit it had; that at the December 8, 2003 meeting Patricia Riggs said that she did not want to borrow any more money, she did not want to put the Company in any more debt, but she agreed to borrow the $25,000 to make payroll and pay the bills; and that Patricia Riggs said that she did not want to invest any more money in the Company. On cross-examination, Heuschel testified that at the December 8, 2003 meeting in Collins' office Patricia Riggs announced a decision to sell the Company and lay off the employees; that Patricia Riggs said that she and Larry had decided to sell the Company, cut costs, and lay off the people as soon as possible; and that when he met with an agent of the National Labor Relations Board (the Board) he advised the agent that Larry Riggs made the decision to conduct the layoff on December 12, 2003, and in his February 25, 2004 affidavit to the Board (R. Exh. 5) he indicated that he did not recall a particular meeting where it was decided to conduct a layoff.

In his February 25, 2004 affidavit to the Board (R. Exh. 5) Heuschel indicated as follows:

> On December 12, 2003 I held a meeting with all employees, both production and clericals, and supervisors were present. In the meeting, I simply read the December 12, 2003 letter signed by Larry Riggs. The letter notified the employees that they were furloughed. The layoff took place immediately. . . . Larry Riggs made the decision to conduct the December 12, 2003 layoff. The discussion of conducting a layoff was an ongoing discussion. I don't recall a particular meeting where it was decided to conduct

the layoff. I have gone to Mr. Riggs' house on several occasions where we discussed the status of the Company. I don't remember the exact date when it was decided to conduct the layoff. We couldn't say anything about a layoff prior to the union vote on December 11, 2003 for fear of an unfair labor practice violation. Riggs and I discussed the layoff months ahead of time and Riggs signed the letter on December 12, 2003, the day after the union vote. The words are Riggs' words but he did not type the letter. In my opinion, the layoff would have taken place before December 12 because of the financial status of the Company. At one point in the fall, 2003 Riggs told me he didn't want to borrow any more money. I don't recall the particular date. [pages 2, 3, and 4 of the affidavit]

. . . .

In the fall, 2003 I talked to Riggs about several problems, including layoff and sale of the business. However, I don't have a specific recollection or a particular date on which I discussed the sale of the company with Riggs. About one week before the election I met attorney Dan Collins. He is Mr. Riggs' attorney who drafted the corporate papers, I went to his office. In that meeting we discussed the financial status of the company and the alternatives. The main alternative we discussed was to sell the company. I don't remember specifically talking about the layoff in that meeting. However, I assume that layoff was discussed. The decision to sell the company was not made at this meeting. I don't know when Riggs made that decision. The purpose of this meeting with Collins was to discuss the sale of the company.

I agreed with the statement in the December 12 letter by Riggs that the company was in a financial crisis. I believe that financial crisis started long before I got here [November 2002]. Riggs got sick in October 2003. The business declined in the fall, 2003. However the fall and winter is usually a slow time of the year for business in the past. We were in much worse shape in the fall 2003 than we had been in previous years so far as finances are concerned. [PP. 6 and 7 of the affidavit.]

Collins testified that at the December 8, 2003 meeting in his office it was decided to sell the Company and Patricia Riggs consented to the decision; that Patricia Riggs, who had power of attorney to act for Larry Riggs, made the decision to sell the Company; that a layoff was discussed by Heuschel, Cash, and Fiorito near the end of the meeting while Patricia Riggs was present; and that his recollection was that if a layoff was necessary, it would be done but he did not "recall a decision to layoff any number of people or a specific decision in that regard at that meeting" (Tr. 200). On cross-examination, Collins testified that at the December 8, 2003 meeting there was a discussion with Patricia Riggs about the extent of the authority of Heuschel, Cash, and Fiorito to draw on the Company's line of credit; that he recalled that there was a discussion of the necessity of laying off some people "simply because there just wasn't enough money to make the payroll" (Tr. 205); that he did not recall a decision being made at this meeting to lay off employees, he remembered a discussion, but he just did not remember anything that specific; that Patricia Riggs knew virtually nothing about the Company and much of the financial condition of the Company came as a surprise to her; that his understanding was that Larry Riggs ran the Company by himself; that he contacted Hutson to represent the Company regarding the labor matter; and that Hutson attended this meeting and the fact that there was an upcoming union vote was discussed at this meeting. On redirect, Collins testified that he was present at all times during this meeting, except when he would have walked out to get a cup of coffee; and that he was not a participant in any discussions concerning when, where and who to lay off.

Regarding the December 8, 2003 meeting at Collins' office, Fiorito testified that Collins was not in the room the entire time of the meeting; that there was a discussion of a need for a layoff at this meeting; that Patricia Riggs said that she was not willing to continue to borrow money and put themselves in more debt, and that she wanted to do layoffs, including her daughter and granddaughter; that Hutson stated at this meeting that if the layoff was performed before the vote, it could be perceived as an unfair labor practice; that she did not recall whether a decision was made at this meeting concerning the date of the layoff; that she was not involved in any meeting or discussion where a specific date was agreed upon; that she did not have any involvement with selecting the date or time of the layoff; that she was involved in discussions on the need for everyone to be laid off; that she and others made this recommendation; and that she had made this same recommendation to Larry and Patricia Riggs on November 12 and 21, 2003. On cross-examination, Fiorito testified that while there had never been an across-the-board layoff before December 12, 2003, at the Respondent, there had been layoffs; that in December because of the holidays there are only 3-productive weeks; that while the Respondent had a line of credit of $135,000, it had used about $124,000; that the contracts the Respondent has are best estimate quantity contracts which means that there is no guarantee that the Respondent is going to get a specified quantity of business and, therefore, the Respondent cannot go to a bank and borrow funds against these contracts; and that if the Respondent gets all of the business estimated under the refueling probe contract, the Respondent will get less than $500,000 profit over a 7-year period. On recross Fiorito testified that she never sent Larry or Patricia Riggs a letter recommending a layoff and she did not remember ever signing such a document.

Cash testified that at the December 8, 2003 meeting at Collins' office Patricia Riggs said that she did not intend to continue on with the Company, she did not want any more money invested into the Company because she wanted the Company sold; and that the subject of layoffs was discussed by the management team with Patricia Riggs and Collins, and with "the advice of her counsel, Mrs. Riggs had instructed us that she did . . . not want any more money borrowed to put into the company and because of that . . . Mrs. Riggs instructed us to lay off the staff and prepare the Company for closure or sale" (Tr. 282, 283). On cross-examination, Cash testified that on December 8, 2003, Patricia Riggs instructed management to lay off the employees; that Patricia Riggs did not give a specific date to lay off the employees; that the decision as to when to

lay off the employees was made by Heuschel, with his input and input from counsel; that counsel advised them not to have any layoff prior to the union vote for fear of causing an unfair labor practice allegation; that the decision to lay off the employees was made at the December 8, 2003 meeting; and that to his knowledge there was no document memorializing the December 8, 2003 decision to lay off employees unless Collins would have notes.

Eric Hoekstra, who worked for the Respondent for about 3.5 years, testified that on or about December 9, 2003, he attended a meeting in the breakroom and Heuschel told the employees that (a) the Union would not be doing the employees or the Company any good; (b) he had been in the Union in the past and it never did any good for him or anybody he ever worked for; (c) conceivably, financially, it could quite possibly cost Starcraft's employees their jobs; (d) the Union was just not going to work for this Company; and (e) the future of Starcraft was in the employees' hands; and that Fiorito said that the Company is indeed doing well, it is surviving, that with the receipt of the new probe contract, the Company would be able to persevere, and since the Company received the new probe contract it could branch out and get some other contracts as well.

Blackman, who was a paint technician with Respondent, testified that he attended an all hands meeting at which Heuschel, Fiorito, and Cash spoke on or around December 9, 2003; that he believed that it was Heuschel who said that if they voted for the Union, they all stood to lose their jobs; and that Heuschel also said that he had been in a union, it had never done anything for him and the Union would not do anything for Respondent's employees, and Heuschel hoped the employees would not vote for the Union.

Cash testified on cross-examination that on evening of December 9, 2003, Elzy asked him what the financial condition of the Company was and he told Elzy that the financial situation of the Company was not good; that this meeting occurred at a sports bar which Elzy choose; and that they did not discuss the Union at this meeting, which occurred at the behest of Elzy, but rather, as here pertinent, only discussed the financial situation of the Respondent.

Heuschel testified that he conducted a meeting with the employees on December 10, 2003; that he already knew that the Company was going to be sold, that there was going to be a layoff and the Company would be closed but he did not tell the employees this at the time because it would have been perceived as threat; and that he used notes (R. Exh. 4) at this meeting. The notes read as follows:

> traditional for management to talk now
>
> a time of transition and crisis and is unfortunate that the union issue has come up at this time.
>
> we have worked hard on all issues
>
> in my opinion adding a union to the company at this time could make the situation almost unmanageable
>
> there is nothing that a union can do that would be positive in this situation.
>
> ask them to vote against the union so we can have a chance to address the issues.
>
> the election will be at 1:30 tomorrow
> important that all technicians vote
> it is a referendum on our future
>
> _____
> Vote No

Heuschel testified that he did not recall ever telling the employees that voting a union in could result in the closing of the Company; and that to the best of his knowledge he did not say that or any words to that effect.

Before the date of the election Payne mailed union hats to Elzy, who testified that he brought the hats in the day before the election, December 10, 2003, and he, Hoekstra, Blackman, Kamradt, Raper, and Rabon wore the union hats. According to Elzy's testimony, employees Teddy Parks and Gary Lyles did not wear a union hat. Hoekstra testified that he wore a union hat from about 8 a.m. to 1 p.m.; and that other named employees wore union hats. Blackman testified that he wore the union hat in the presence of Heuschel, Fiorito, and Cash; and that he did not see Parks or Lyles wearing a union hat. Rabon testified that he wore a union hat for a couple of hours on December 10, 2003, and he did not know whether any supervisor saw him wearing the hat.

Cash testified that a group of employees wore union hats in the plant on December 11, 2003, and he believed that only Lyles and Parks did not wear the union hats.

On December 11, 2003, a majority of the employees of the Respondent in the above-described bargaining unit by a secret-ballot election in Case 11–RC–6552, conducted under the supervision of the Regional Director for Region 11 of the Board, designated and selected the Union as their representative for the purpose of collective bargaining. During a preelection conference on December 11, 2003, Union Representative Payne asked Respondent's attorney, Hutson, who paid David Marion Nelson, whose name appeared on the *Excelsior* list (GC Exh. 4). Hutson advised Payne that a temporary agency paid Nelson and Respondent paid the temporary agency. Payne challenged Nelson. Respondent challenged Erik Hoekstra, who voted. The vote was five for the Union, two against the Union and there were the two aforementioned challenges. On cross-examination, Payne testified that while he and Hutson were alone in the room where the election was going to be held, Hutson told him that the Union would probably win the election, so in the short term it was going to do alright, but for the long term it did not look as good; that the Respondent had its problems and the future was uncertain; that Hutson asked him for information on how he could be contacted; that he gave Hutson his cell phone number and his fax number (R. Exh. 1); and that according to his recollection and his records, he did not receive a telephone call from Hutson on December 12, 2003. On redirect, Payne testified that on December 11, 2003, Hutson did not really say that the Respondent was going out of business but rather Huston said the Respondent was not doing well and the future was unclear, it just did not look good; and that Hutson did not say anything about a layoff.

On December 10, 2003, Fiorito resigned effective December 11, 2003. On cross-examination, she testified that prior to December 12, 2003, she never told any employee that the Company was in serious financial crisis or in jeopardy of bankruptcy. On redirect, Fiorito testified that she was not present at Respondent's facility on the day of the layoffs.

According to the testimony of Elzy, about 10:30 a.m. on December 12, 2003, the employees received a memorandum from the Respondent indicating that the Christmas party scheduled for December 18, 2003, was canceled due to a lack of interest. (GC Exh. 11.) The invitation (GC Exh. 10) reads as follows:

CHRISTMAS PARTY

All Starcraft Aerospace employees and a guest are invited to attend the annual Christmas Party:

December 18, 2003
Holiday Inn on Augusta Rd.
11:30 am

Please let Wendy know if you and a guest will attend by Dec. 15. Hope everyone can attend !!!

Elzy testified that no one approached him about whether or not he wanted the Christmas party; that Wendy did ask him if he was bringing a guest and he told her that he was not; and that for Christmas the last few years the Respondent has bought the employees and their spouses or a guest lunch at the Holiday Inn and the Respondent in the past has given $100 bonuses to everybody at the Christmas lunch.

Heuschel testified that it was his decision to cancel the Christmas party and he made the decision on the morning of December 12, 2003, after he asked Wendy Mimms, who was in charge of keeping track of who was going to the party, how many people responded. According to Heuschel's testimony, Mimms told him that only two people responded that they were going to go, namely Cara Midlan and John Raven (Rabon?); that Elzy did not respond that he was going to go to the Christmas party; and that there was no other reason for canceling the Christmas party. On cross-examination, Heuschel testified that it was not his responsibility to keep track of which employees indicated that they did not want to attend the Christmas party in December 2003; and that Mimms kept track of this.

Elzy testified that Heuschel held a meeting on December 12, 2003, in the breakroom with all of Respondent's employees; that Heuschel said that it was the hardest thing that he had ever had to do but effective immediately all personnel were furloughed; that there was a police officer right outside the breakroom during this meeting; that in the 3 or so years that he had worked for the Respondent there had never been a mass layoff; and that the Respondent issued a notice to the employees on December 12, 2003 (GC Exh. 6). The notice reads as follows:

12 December 200 . . . [3]

As each of you is aware, Starcraft Aerospace, Inc. has been in a significant financial crisis this season. Most of you, however, are unaware of exactly how bad the situation actually is.

Our receivables have been at a record and unprecedented low for many months, and we are faced with the need to start borrowing against credit to meet our basic expenses and payroll. In order to save the company from possible bankruptcy, it has become necessary to make a difficult decision.

Effective immediately, all hourly employees are furloughed.

We plan for work at Starcraft Aerospace, Inc. to resume at 8:00 am on 05 January 2004. You will be notified of any change to these plans.

Paychecks and Direct Deposit receipts for the current pay period will be mailed to your address of record.

Larry Riggs
Owner
Starcraft Aerospace, Inc.

Elzy further testified that before this no supervisor ever told him that the Company was in a significant financial crisis or that the Company was in possible jeopardy of bankruptcy.

Hoekstra testified that on December 12, 2003, all the employees were called into the breakroom and told by Heuschel that all of the employees were furloughed; and that no supervisor ever said anything to him about the Company being in a financial crisis before December 12, 2003.

Blackman testified that before this layoff no supervisor ever told him that the Company was in any significant financial crisis or in possible jeopardy of bankruptcy.

Rabon testified that no supervisor ever told him before December 12, 2003, that the Company was experiencing a financial crisis, and before this he did not have any indication that the Company was in bad financial health or about to lay him and other employees off; that there had never been a layoff at the Respondent since he started working there in July 1999; and that before the December 12, 2003 layoff he had been working 40 hours a week steadily.

Kamradt testified that before December 12, 2003, no one told him that the Company was experiencing a financial crisis.

Heuschel testified that he drafted the layoff letter for Larry Riggs signature, he took it over to the Riggs' house on the morning of December 12, 2003, and Larry Riggs signed the document; that the December 12, 2003 layoff affected all of Respondent's personnel except management; that the contract administrator, Deb Burton, and the accounts person, Mimms, were brought back to work on Monday, December 15, 2003, so that management could try to figure out what to do regarding finances; that at the time there were unfilled orders in that there were a few seats, valves and antenna; that business was very slow at the time; that he called the employees together and told them about the layoff between 1:30 and 2 p.m. because he did not have the signed letter from Larry Riggs until that time; that he did not wait until 4 p.m. because Larry Riggs told him to do it as soon as possible; that he had a police officer present just in case there was a problem with the layoff; and that the police officer just stood in the doorway of Heuschel's office. On cross-examination, Heuschel testified that Larry Riggs decided on the December 12, 2003 layoff; that he did not personally send a notice or notify the Union prior to the decision; that while the Respondent had a line of credit in excess of $100,000 guaranteed by Larry Riggs, as indicated above, the Respondent

had already borrowed a specified amount against the line of credit; that the Respondent had been under financed for several years and to his knowledge, the Respondent had not laid anyone off in the past; that the difference was that the Respondent was in worse financial shape than ever before; and that while the balance sheet for December 2003 (GC Exh. 20) shows $32,224 in the Respondent's checking/savings account, vis-à-vis $11,457 in September 2003 (GC Exh. 21) the money in the bank in December 2003 was borrowed money.

Payne testified that he did not receive a telephone message from the Respondent's attorney, Hutson, on December 12, 2003, and he checked his telephone records; and that at 1:30 p.m. on December 12, 2003, he was probably eating lunch in Atlanta, Georgia, with representatives of the Nabisco company and his union committee, after signing a contract. Payne further testified that General Counsel's Exhibit 17 is his telephone record covering December 12, 2003, and it does not show a telephone message from Respondent's counsel, Hutson.

Hutson testified that, as indicated in Respondent's Exhibit 2, he called the cell telephone number Payne gave him, Respondent's Exhibit 1, at 1:30 p.m. on December 12, 2003. Hutson testified that he did not speak with Payne personally but rather left a message on Payne's cell phone informing Payne that at 2 p.m. that day at the end of the shift the Respondent would be furloughing all employees; that he never heard back from Payne; and that he has no way of knowing that Payne received the message. On cross-examination, Hutson testified that he did not, and to his knowledge the Company did not, send Payne any written correspondence about the layoff prior to the layoff; and that while he had Payne's fax number, he did not send Payne a fax. Subsequently, Hutson testified that in the message "I told Mr. Payne that as we had briefly discussed the day before, that the company was closing down and would be laying off all employees that day; and that I would be glad to talk with him about it or the company would be glad to talk to him about it." (Tr. 122.)

On December 12, 2003, Payne received a telephone call from Elzy who informed him that management called the Respondent's employees to a meeting about 1 or 1:30 p.m. and with a police officer present laid off all of the employees in the unit. Later that evening Elzy faxed Payne the notice the Respondent's employees received on December 12, 2003, from the Respondent.

On December 24, 2003, the Regional Director for Region 11 of the Board certified the Union as the exclusive collective-bargaining representative of the employees in the involved unit. (GC Exh. 5.)

Heuschel testified that employees had to be called back to do some of the parts; and that the recall was based on seniority and qualifications in that the employee had to be qualified to work on a piece of equipment in order to be called back. On cross-examination, Heuschel testified that Raper and Nelson were recalled before the other employees because the seats had to go out; that the Company had missed some deadlines on these seats; and that Nelson was a temporary employee.

General Counsel's Exhibit 13 is a letter dated December 29, 2003, from Heuschel to Hoekstra which reads as follows:

> Due to the continuing financial problems of Starcraft Aerospace, Inc., you are hereby notified that your status is changed from temporary furlough status to indefinite layoff. You will be notified by telephone and/or mail if or when to return to work.
>
> Information about your insurance coverage will be mailed to you in the next few days.[4]

Hoekstra testified that his training records reflect that he had been signed off on two of the three models of aircraft seats. On cross-examination, Hoekstra testified that Gene McMillan was the maintenance manager when Hoekstra was signed off; that part of his training record which he was shown during cross-examination was missing in that there was nothing in the record indicating that he had been trained on seats; that Larry Riggs, Raper, and Keith Thomas could verify that he was trained on the seats; and that he received two written warnings and was suspended once. On redirect, Hoekstra testified that McMillan signed off on his training in 2000.

Heuschel testified that on December 29, 2003, he sent a letter making the layoff an indefinite layoff because the financial status of the Company had not improved. On cross-examination, Heuschel testified that the December 29, 2003 layoff was his decision; and that he did not send a notice or notify the Union prior to making the decision.

Heuschel testified that the only individuals qualified to work on the aircraft seats which have electric motors in them are Raper, Nelson, and Cash; that Hoekstra was not qualified to work on the aircraft seats and he had no knowledge of Hoekstra ever being trained to work on aircraft seats; that Raper and Nelson were recalled at the same time, during the first week of the layoff, to work on the aircraft seats; that he recalled Elzy, Kamradt, Lyles, and Parks; that Rabon refused to come back; that he did not recall Hoekstra and Blackman because he did not have any work for them; that Hoekstra was not recalled because Burton did the shipping and receiving, in addition to a number of other jobs; that Blackman was not recalled because the other painter who had more seniority, Lyles, was recalled; and that Elzy and Raper subsequently quit. On cross-examination, Heuschel testified that after Raper and Nelson were recalled, McMillan was brought in for 1-1/2 hours for two nights to train Raper and Nelson; and that Rabon turned down the Respondent's job offer because it was for a part-time job and Rabon wanted a full-time job.

On rebuttal, Rabon testified that he turned down the job offer because the Respondent only offered part-time employment, namely 8 a.m. to 12 noon, Monday through Friday; that he was capable of working on navigational switching units; and that

[4] Blackman testified that he received this same December 29, 2003 form letter and it did not even have his name or address on it, GC Exh. 14; and that when he left work on December 12 he had two seats to paint and each seat takes 4 hours. On cross-examination, Blackman testified that the other painter in the shop, Lyles, had worked for the Respondent longer than he had. Rabon also received the same December 29, 2003 form letter with his name and address on it. GC Exh. 15. Rabon testified that he could have assisted Raper working on the seats. On cross-examination, Rabon testified that he had not been signed off to work on the seats.

you do not need to be certified to work on navigational switching units because they were going to be certified by Lockheed Martin.

Elzy testified that he was recalled about January 5, 2004; that he thought that Raper came back a week before he did; that when he returned Parks, Lyle, Nelson, and all of the office personnel were there; that Nelson and Raper worked on aircraft seats; and that at the time there were a lot of seats waiting to be worked on.

On January 5, 2004, Elzy telephoned Payne and told him that the furlough or temporary layoff was changed to an indefinite layoff. Payne testified that the Union was not notified or offered an opportunity to bargain before this or the December 12, 2003 layoff.

Payne sent the following letter, dated January 7, 2004, and received as General Counsel's Exhibit 7, to Respondent:

> Mr. Robert Herschel, General Manager
> Starcraft Aerospace Inc.
> . . . .
> . . . .
>
> Mr. Herschel:
>
> The Union maintains that the indefinite layoff of John Rabon, Al Kamradt, Erik Hoekstra, and V. Blackman was improper and in violation of the National Labor Relations Act. The Union is prepared to meet and discuss the status of the aforementioned employees. In any event, the Union must insist that these employees be reinstated, returned to work immediately, and be made whole.
>
> Further, the Union requests that it be informed and given the opportunity to bargain over any other changes that the Company may anticipate which involves bargaining unit employees. Finally, the Union is prepared to commence with the process of negotiating a collective bargaining agreement as soon as possible. I can be available any week in January and February.
>
> Please contact me at . . . to establish a time and place to commence negotiations.

Heuschel sent Payne the following reply, dated January 12, 2004, and received as General Counsel's Exhibit 8:

> On behalf of Starcraft Aerospace, Inc., we are prepared to meet and discuss any issues you may wish to raise in connection with your certification as the exclusive collective bargaining representative of certain employees of this Company. I remind you that you were informed of our willingness to do so by telephone message from our attorney on December 12, 2003.[5]
>
> I request that you make the arrangements for such a meeting through our attorney's office by calling . . . or writing to him at . . . . I also request that you copy Mr. Hutson with all future correspondence.

In February 2004, Elzy resigned.

The first week in February 2004, after Elzy resigned, Kamradt, who is a part-time technician who works 4 hours a day 4 or 5 days a week, returned from the December 12, 2003 layoff. He had received an indefinite layoff letter similar to the above-described General Counsel's Exhibit 14. Kamradt testified that he picked up some of Elzy's work.

Heuschel testified that the first purchase order under the refueling probe contract was received by the Respondent in February 2004; that at the time of the trial herein the Respondent had not done any work on the first purchase order; that the work under the first purchase order is to be delivered January 2005; that usually 30 days after delivery, the Respondent is paid so it is anticipated that the first payment for the delivery of the first two units will occur in February 2005; that there is a very high cost to the Respondent associated with performing this contract in that the Respondent is furnishing the material and parts; that he guessed that the start up costs for the Respondent to service this contract would be approximately $200,000; and that the Respondent has only one person who is qualified to work on the refueling probes.

Fiorito sponsored Respondent's Exhibit 6 which are accrual profit and loss comparisons for the last calendar quarters of 2003 and 2002, and for January 2004 and January 2003. The printouts were generated on February 11, 2004. The comparisons show a net income loss of $21,157 for October 2003 versus a net income gain of $174 for October 2002, a net income loss of $33,478 for November 2003 versus a net income loss of $7,072 for November 2002, a net income loss of $46,264 for December 2003 versus a net income loss of $40,819 for December 2002, and a net income gain of $1553 for January 2004 versus a net income gain of $564 for January 2003. Fiorito testified that she prepares profit and loss comparisons on a regular basis.

Heuschel testified that at the time of the trial herein the Respondent was trying to sell the Company but it had not found a buyer, and it had enough work to barely make the payroll and pay its bills. On cross-examination, Heuschel testified that the Respondent has piece parts contracts with McDonald Douglas, Raytheon, Lockheed Martin, and the United States Air Force; that the McDonald Douglas and Raytheon contracts were signed in 2000, and the Lockheed Martin contract is a long-term continuing contract which the Respondent has had since it has existed; and that one week before the trial herein the Respondent had hired another temporary employee to work on a special project, namely navigation switching units.

Robert Kinard, a certified public accountant, testified that he prepares the Respondent's tax returns at the end of the year; that while he has not done a full scale audit of the Respondent, in his professional judgment, looking at the financial statements the Respondent submitted to him, the tax returns, the ratios and numbers involved, the Company was not a viable ongoing concern without some sort of major influx of capital; that typically you would want $4 or $5 of assets for every dollar of liability and the Respondent was just the opposite in that it had more liabilities than assets; and that sometime in September, October, or November 2003 he was consulted concerning the sale or closing of Starcraft. On cross-examination, Kinard testified that the Respondent has been under capitalized since 1999, it has had cash flow problems, it has borrowed, and the liabilities just keep increasing.

[5] As noted above, Payne denies this.

Analysis

Before treating the merits, a procedural matter must be addressed. On June 9, 2004, the Respondent filed a Motion to Reopen and Supplement the Record with evidence about the minutes of a special meeting of the shareholder and director of the corporation (It is indicated that on the death of Larry Riggs on May 7, 2004, all of the issued and outstanding shares of the Company which was wholly owned by Larry Riggs were transferred to Patricia Riggs, who is now the sole shareholder of the Company.) held May 24, 2004, in anticipation of the closing of the Company. Respondent submits that the evidence did not exist at the time of the trial, it would not necessitate reconvening the trial, and it simply completes the story. Counsel for the General Counsel opposes the motion arguing that the proposed evidence is neither relevant nor material to the crucial issues in this case. I must agree with counsel for the General Counsel. The Respondent's Motion to Reopen and Supplement the Record is hereby denied.

Paragraphs 8(a), (c), and (d) of the complaint collectively allege that the Respondent, through Cash, in late November early December 2003 interrogated its employees about their union activities, and threatened its employees by informing them that the Employer's lease would be terminated and it would lose business if the employees selected the Union as their collective-bargaining representative.[6] As counsel for the General Counsel points out on brief, this alleged conduct assertedly occurred during an individual conversation. Counsel for the General Counsel contends that Cash's testimony about this conversation is implausible and inconsistent in that Cash denied having previously supported the Union while acknowledging that he was the first to contact the Union, and later Cash told Elzy that he no longer supported the Union; that these admissions clearly demonstrate that Cash talked about the Union with Elzy and during this discussion he interrogated and threatened Elzy with the cancellation of Respondent's lease and the loss of the Lockheed business; and that in view of the threatening nature of this interrogation, it was coercive and therefore unlawful, *Rossmore House*, 269 NLRB 1176 (1984). Respondent on brief argues that the issues involved in the case and the possibility of a remedy even if a violation of the Act was found, appear to be largely irrelevant and thus a discussion of them will be brief; and that the allegations regarding Cash do not show interference, restraint or coercion in a real or even technical sense.

Elzy's testimony is credited. I find him to be a credible witness. I do not find Cash to be a credible witness. For some time Cash has wanted to purchase this Company. Consequently, he has more than a passing interest in whether its employees were represented by a Union. Elzy testified that Cash asked him about his support for the Union while Cash threatened the loss of Starcraft's lease and its Lockheed business. Cash's denial is equivocal. Cash testified in terms of not recalling questioning Elzy about his support for the Union and not recalling mentioning the lease or Lockheed during this conversation. Cash concedes (he believes) that Elzy asked him what he thought of the Union. And while Cash concedes that he did discuss Lockheed with Elzy, he places this conversation in September 2003. Cash goes on to assert that he did not believe he told Elzy that Starcraft could lose Lockheed's business because counsel had advised him not to make statements that could be construed as a threat. Exactly when this advice was given was not made a matter of record. Without even considering any question as to whether the advice—taking into consideration what Cash might perceive to be in his own best self interest—was followed, it is not clear on this record that such advice was given before the conversation in question. Consequently, even this equivocation is not entitled to any weight. Cash's questioning of Elzy would reasonably tend to restrain, coerce, or interfere with Elzy's Section 7 rights and, therefore, it constituted an interrogation in violation of Section 8(a)(1) of the Act. The Respondent violated the Act as alleged in paragraphs 8(a), (c), and (d) of the complaint.

Paragraph 8(e) of the complaint alleges that the Respondent, through Heuschel, in early December 2003 threatened its employees with job loss if the employees selected the Union as their collective-bargaining representative. Counsel for the General Counsel on brief contends Heuschel made some notes prior to the involved meeting and he used the notes as a guide in conducting the meeting; that when asked whether he elaborated on the statement in his notes referring to "time for transition" Heuschel testified that he could not recall; that while Heuschel's notes contain the statement "it is a referendum on our future," while testifying at the trial herein, he had no clear recollection of having made this statement but rather he testified "that's what's on my notes" (Tr. 146); that either Heuschel had no independent recollection of what he said in this meeting or he was being deliberately disingenuous; that his failure to recall the most basic points of the meeting, absent his notes, reflects an attempt to avoid truthfulness about this meeting; and that based on the timing of the meeting and Respondent's strong opposition to the Union, coupled with the corroborated testimony of Hoekstra and Blackman, Heuschel did threaten employees with loss of jobs, in violation of Section 8(a)(1) of the Act, *Columbia Mills, Inc.*, 303 NLRB 223 (1991). Respondent on brief argues that

> The allegations concerning General Manager Heuschel's last minute talk to employees are even more irrelevant [than the allegations about Cash's alleged interrogation and threatening of Elzy]. The decision to sell or close had already been made and attorney Collins had already undertaken steps toward selling the business. It may be ironic that ultimately the unfair labor practice charge filed by the Union and pursued by the General Counsel killed all possibilities for finding a new owner who might hire some of the Starcraft workforce, but Heuschel could not know about the charges or their effect on the potential for selling the business at that time and he did not make the statement that was self-servingly attributed to him by the General Counsel's witnesses. Even if he had done so,

[6] There is no evidence of record supporting par. 8(b) of the complaint which alleges that the Respondent, through Cash, in mid-November 2003 threatened its employees with plant closure if the employees selected the Union as their collective-bargaining representative. Consequently, this portion of the complaint will be dismissed.

an after the fact comment cannot logically be said to reflect on a decision made before the decision maker had a reason to believe that the Union was supported by a majority of the employees. [R. Br. 13.]

Heuschel's testimony on direct regarding this meeting reads as follows:

Q. Mr. Heuschel, did you conduct a meeting with employees prior to the Union election on . . . December 10th?

A. I conducted a meeting with all the technicians.

Q. . . . did you have any notes on that meeting?

A. Yes, sir.

Q. Allow me to hand you what's been marked as Respondent's Exhibit 4. Can you identify that for me?

A. Yes, sir, these are my notes of what I was going to talk about at that meeting.

. . . .

Q. . . . at the time of that meeting, according to your testimony here today, you already knew that the company was going go be sold, that there was going to be a lay-off or that the company was going to be closed. Is that correct?

A. Yes, sir.

Q. Did you tell the employees that?

A. No, I did not.

Q. Why not?

A. Again, it would be perceived as a threat. That was before the election.

Q. Did you say anything about the potential closing of the plant?

A. Not that I can recall.

Q. How long did this, did you[r] talk at this meeting last?

A. This was very short. This was just a few minutes, maybe five minutes.

Q. Now I want you to look at the second paragraph on your notes and read that to us.

MR. BROWN: Your Honor, I object. it hasn't been shown the witness' recollection of the meeting has been exhausted yet.

JUDGE WEST: Sustained.

Q. The second paragraph on your notes indicates that you said "this is a time of transition." Tell us what you said about that.

A. I said, in my opinion, adding a Union to the company, at this time, could make the situation almost unmanageable.

MR. BROWN: Your Honor, I, again, object. The witness is actually reading from the document, and his recollection has not been shown to be exhausted as to this meeting.

JUDGE WEST: Sustained.

MR. HUTSON: Your Honor, if I may, the witness is entitled to give his best memory of what he said. If it's—

JUDGE WEST: Not reading from a document that'd not even in evidence yet, just marked for identification, and it would speak for itself if it was in evidence.

Q. All right. Mr. Heuschel, what did you do in this meeting? What did you do to these notes during that meeting? What did you do to these notes during that meeting? Did you have them with you?

A. Yes.

Q. What did you do with them?

A. I kept them.

Q. And did you read from them at the meeting?

A. I, before a meeting, the All Hands Meetings, or whatever meetings I have, I make notes of what I'm about to talk about, and I hold these and read parts and try to speak to people based on what I'm thinking. The notes are my guide to tell me what I'm going to talk about. These are the topics and what I'm about to say.

Q. Did you use these notes, Respondent's Exhibit 4, during that meting?

A. Yes.

Q. Did you use them in the manner you just described?

A. Yes.

MR. HUTSON: I move for the admission of Respondent's Exhibit 4.

JUDGE WEST: Any objection?

MR. BROWN: None, your Honor.

JUDGE WEST: Respondent's 4 is received into evidence.

. . . .

Q. Did you elaborate on this question of "time for transition" . . . at all during that meeting?

A. I don't recall. That was five months ago.

Q. All right. You, did you give your opinion about the effect of having a Union come into the company at that time?

A. I—did I give my opinion?

Q. Yes.

A. I stated it's a referendum on the company, the company's future, that is.

Q. You did say that?

A. To the best of my recollection, that's what I said. That's what's on my notes.

Q. Did you, at any point, tell the employees that voting a Union in could result in closing of the company?

A. I don't recall ever saying that. No.

Q. To the best of your knowledge, did you or did you not say that?

A. I did not. To the best of my knowledge, I did not say that.

Q. Did you say any words to that effect?

A. I don't think so. To the best of my knowledge, I did not. [Tr. 142–146.]

As can be seen, the allegation is that Heuschel threatened employees with job loss if the employees selected the Union as their collective-bargaining agent. The plant closure allegation in the complaint, paragraph 8(b), spoke to what Cash allegedly said in mid-November 2003. As noted above, since counsel for the General Counsel did not introduce any evidence with respect to that allegation, that paragraph of the complaint will be dismissed. As the record stands, the only denial of Heuschel which can even be claimed to be pertinent is "words to that effect" (Tr. 146). Obviously one could threaten job loss to the 8

technicians without threatening the closing of the Company, which employs about 20 people. Heuschel could have been unlawfully telling the eight technicians that they were going to be replaced.[7] In my opinion Heuschel has not unequivocally denied this allegation. And if Heuschel's above-described testimony is considered to be a denial of the allegation, I did not find Heuschel to be a credible witness. His testimony regarding canceling the Christmas party, as treated below, is incredible. The testimony of Hoekstra and Blackman with respect to what Heuschel said at this meeting is credited. The Respondent violated the Act as alleged in paragraph 8(e) of the complaint.

Paragraph 9 of the complaint alleges that the Respondent on December 12, 2003, unlawfully canceled its annual employee Christmas party because the employees joined, supported, or assisted the Union, and engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and in order to discourage employees from engaging in such activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection. And paragraph 17(a) of the complaint alleges that Respondent refused to bargain with the Union in that the Respondent unilaterally canceled its annual employee Christmas party without prior notification to or consultation with the Union. Counsel for the General Counsel on brief contends that the Respondent should have called Mimms, who was its contact person for the Christmas party, to corroborate Heuschel's assertion that Mimms told him that only two people responded that they were going to go to the Christmas party; that the Respondent stated no reason for its failure to present Mimms for testimony in this matter; that the failure of the Respondent to call Mimms requires an adverse inference; that the reason given by Heuschel has been shown to be unsubstantiated and lacking in merit; that in view of the timing of the cancellation, coupled with Respondent's animus, Respondent's precipitous and abrupt cancellation of the Christmas party, is violative of Section 8(a)(3) of the Act; that the $100 bonus given at the Christmas party was an established benefit which augmented the employees' regular wages; and that by eliminating this benefit without first notifying and consulting with the newly-selected bargaining representative, Respondent violated Section 8(a)(5) of the Act, *Southern States Distribution, Inc.*, 264 NLRB 1 (1982); *American Safety Corporation*, 241 NLRB 115 (1979); and *Allied Products Corp.*, 218 NLRB 1246 (1978). Respondent on brief argues that this allegation is frivolous in the context of the failure and closing of this business; that there is no allegation in the complaint that any money was involved and the potential harm to unit employees was an evening out for the "one" (R. Br. 13) person who had responded to the R.S.V.P. request; that the "Company had a right to discontinue all of its business activities and it did so" (id.); that the decision not to spend money on a Christmas party was an essential part of that decision; and that it was not a mandatory subject of bargaining and the Company had the right to discontinue that cost in the same way that it discontinued other payroll costs by the furlough of all employees.

According to the Respondent's notice of the Christmas party, the employees had until December 15, 2003, to let Mimms know if they were going to attend. Heuschel canceled the party more than 3.5 days before the employees were even expected to reply indicating whether or not they were going. There is no showing either that Mimms took it upon herself or she was directed to ask the employees before the deadline and before Heuschel canceled the party whether they would be attending the Christmas party. I do not believe that Heuschel made the decision to cancel the Christmas party on his own. He would not have taken this action without Larry Riggs approving it. In my opinion Larry Riggs made this decision. In the past the employees and their spouse or guest received a free meal and the employees received a $100 bonus. In those circumstances, it is hard to imagine, from a common sense standpoint, why an employee would not go to the Christmas party. Elzy's testimony that no one approached him and asked him whether or not he wanted the Christmas party is credited. Mimms did ask him if he was bringing a guest and he told her that he was not. The record does not establish if Mimms asked him after the Board election or before, and it does not establish that this was a formal inquiry as opposed to a coworker making conversation. While on brief Respondent apparently takes the position that only "one" person responded to the R.S.V. P., Heuschel testified that he was told by Mimms who was told by two other people that they would be attending the Christmas party. In view of the fact that the employees still had the remainder of December 12 and all of December 13, 14, and 15 to respond to the Christmas party notification, it is not clear how Heuschel could gauge interest on the morning of December 12, 2003. I agree with counsel for the General Counsel. In these circumstances, the failure of the Respondent to call Mimms as a witness to explain what was going on warrants an adverse inference that the Respondent did not call her as a witness because her testimony would not support the testimony of Heuschel regarding the canceling of the Christmas party. The Respondent's argument on brief that the Respondent had the right to make a business decision to discontinue all of its business activities and it did so is disingenuous at best. On December 12, 2003, the Respondent did not discontinue all of its business activities. One way of viewing what the Respondent did is to take the position that it was done to retaliate for the technicians bringing a Union into the entity that Larry Riggs brought into existence and nurtured. As noted above, the General Counsel contends, the $100 bonus given at the Christmas party was an established benefit which augmented the employees' regular wages. The complaint speaks only to Respondent canceling "its annual employee Christmas Party."[8] It has not been shown that

[7] The "referendum on our future" language is vague and could be viewed in terms of what the future of the Company might look like and not necessarily that the Company would not have a future.

[8] It is noted that the charges filed in this case by the Union refer only to the party itself and that counsel for the General Counsel did not move to amend the complaint to speak to the bonus. Also, as noted above, the Respondent on brief argues that there is no allegation in the complaint that any money was involved. There is no showing that counsel for the General Counsel only discovered this fact during the trial herein. In these circumstances, I do not believe that it would be

the Christmas party was related to any performance or production standard. It appears, therefore, that it was a gift rather than a term or condition of employment. Thus, the Respondent did not have to bargain with the Union about its cancellation. *Stone Container Corp.*, 313 NLRB 336, 337 (1993), and *Benchmark Industries*, 270 NLRB 22 (1984). The Respondent, therefore, did not violate Section 8(a)(5) of the Act as alleged in paragraph 17(a) of the complaint. Nonetheless, was its conduct a violation of Sections 8(a)(1) and (3) of the Act? In my opinion Heuschel lied under oath about the reason for the cancellation. As found above, the Respondent engaged in other conduct which demonstrates its antiunion animus. And it is inescapable that the unit employees would view the cancellation as a message that this action, taken the day after the election and 3.5 days before they were even required to R.S.V.P., was a result of a majority of them voting for the Union to represent their collective interests. But on the other hand, the Christmas party was not just canceled for the eight unit employees. Rather the party was canceled for all of Respondent's approximately 20 employees. It was not a happy time for management in that not only did the Respondent lose the election but the founder and owner of the Company could no longer come to the Company's facility and work in that he was dying with Lou Gehrig's disease. Occurrences can and sometimes have to be viewed from different perspectives. From management's perspective, even aside from the election loss, it was hardly a time for celebration. All of this should be coupled with the fact that I do not believe that it has been shown that the party was sufficiently regular and substantial or a part of the employees' reasonable expectations to constitute a term and condition of employment for the purpose of sustaining a violation of Section 8(a)(1) and (3). I do not believe that It has been shown that the Respondent violated Section 8(a)(1), (3), or (5) of the Act as alleged in paragraphs 9 and 17(a) of the complaint.

Paragraph 10 of the complaint alleges that the Respondent on December 12, 2003, unlawfully temporarily laid off Elmo Blackman, Trey Elzy, Albert Kamradt, Gary Lyles, Clarence Parks, John Rabon, Anthony Raper, and Eric Hoekstra; that on January 5, 2004, the Respondent unlawfully temporarily laid off Elzy, Lyles, Parks, and Raper; and that on January 12, 2004, the Respondent unlawfully temporarily laid off Kamradt. And paragraph 11 of the complaint alleges that the Respondent on December 29, 2003, unlawfully laid off (permanently) and thereafter refused to reinstate Elmo Blackman, John Rabon, and Eric Hoekstra. Paragraph 12 of the complaint alleges that Respondent engaged in the temporary and permanent layoffs because the employees joined, supported, or assisted the Union, and engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and in order to discourage employees from engaging in such activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection. Respectively, paragraphs 17(b) and (c) of the complaint allege that the Respondent refused to bargain with the Union regarding the temporary and permanent layoffs in that the Respondent unilaterally took these actions without prior notification to or consultation with the Union.

Counsel for the General Counsel on brief contends that Heuschel's testimony in regard to the decision to conduct the December 12, 2003 layoff was specifically refuted by Riggs' own personal attorney; that since Heuschel testified that it was Patricia Riggs, on behalf of Larry Riggs, who made the decision to lay off employees in the December 8, 2003 meeting, then it became imperative that she step forward and present the facts as to this decision; that the Respondent put forth no reason for its failure to call Patricia Riggs to testify about this matter; that as the person most knowledgeable as to this issue, she should have been a decisive witness in this proceeding, and, therefore, it should be found that if Patricia Riggs had been called to testify by Respondent, her testimony would have been adverse to its case, *International Automated Machines, Inc.*, 285 NLRB 1122 (1987); that Heuschel's testimony as to the financial health of the Company and in regard to the lack of business was not supported by documentary evidence; that Heuschel did not notify the Union of the December 12, 2003 temporary layoff; that the Respondent never laid off all of its production workers in the past despite being under financed for several years; that there is a question whether a message was actually left on Payne's cell phone on December 12, 2003; that since Heuschel secured Larry Riggs' signature on the layoff document on the morning of December 12, 2003, Hutson's telephone message was untimely in any event; that while Heuschel admitted that he made the decision to convert the layoff to an indefinite layoff on December 29, 2003, he failed to notify the Union; that the Board has held that where the central aim of a layoff is to discourage union activity or to retaliate against employees because of the union activities of some, the layoff will be found to be unlawful even though employees who might have been neutral or even opposed to the union are laid off with their counterparts, *American Wire Products*, 313 NLRB 989, 994 (1994); that the Board has held that the hiring of new employees as replacements for those who were laid off, constitutes patent evidence that Respondent's stated reason for the layoff is pretextual and was designed to conceal its unlawful motivation, *Goldtex, Inc.*, 309 NLRB 934, 940 (1992); that the Respondent's animus against the Union and its adherents was shown by Cash's above-described threats and by the fact that Heuschel threatened employees with loss of jobs; that Hoekstra and Rabon testified that they were able to work on the seats and navigational switches and Respondent's retaining of temporary employee Nelson and the hiring of another temporary employee after the December 12, 2003 layoff illustrates the discriminatory nature of the layoff and reflects a prima facie showing of discriminatory motive as to Respondent's conduct; that having a cash flow problem in the past had not been a reason for a layoff, since Heuschel admitted that Respondent had never had a layoff in the past, despite its financial condition; that the decision to lay off the entire work force on such short notice does not make sense in view of what the Respondent was telling employees, namely that it believed that it had a sound financial future; that the evidence fails to show a severe problem either in the availability of work or in regard to Respondent's cash flow, that would justify such a precipitous and far

proper for me sua sponte to expand the allegation to include the bonus. And I do not believe that the allegation regarding the party encompasses the bonus.

reaching layoff for this small bargaining unit; that an employer's duty to avoid unilateral changes in wages, hours, and working conditions attaches when the Union wins the election, and if an employer makes material unilateral changes between the election and certification, it acts at its peril when it does so absent compelling economic considerations, *Celotx Corp.*, 259 NLRB 1186 (1992); and that since the Respondent failed to present any compelling economic consideration for its abrupt layoff, Respondent acted at its peril and it should be made to suffer the consequences of its conduct.

Respondent on brief argues that this case involves only an individual owner's decision to not make additional investments in a business, to sell it if possible and, otherwise, to close it; that the evidence shows that economic considerations including declining sales, the necessity of additional capital for new contracts, and the lack of a financial reserve compelled the decision; that even if the decision had been driven in whole or part by anti-union animus, it would not have violated the Act; that the General Counsel failed to establish a prima facie case because he was unable to show that the discontinuance of union work was unaccompanied by a basic change in the nature of the employer's operation, *Dubuque Packing Co.*, 303 NLRB 386 (1991); that a second failure of the General Counsel's allegations relates to the timing of the decision in that even if Respondent would otherwise have had an obligation to bargain over the layoff, the timing of the decision would have negated that obligation; that in *Consolidated Printers*, 305 NLRB 1061, 1067 (1992), it was held that an employer has no obligation to bargain with respect to its decision made before the union election to work employees through the election and then implement a layoff because the decision was made prior to the time it became obligated to bargain with the Union; that this principal was reaffirmed in *SGS Control Services*, 334 NLRB 858 (2001); that "[a]t the December 8 meeting at the law office of Dan Collins, Mrs. Riggs announced a decision to sell the Company, if possible, and, otherwise, to close it and she announced a decision not to invest any more money in the Company [Tr. 138:21–24] . . . . At the December 8 meeting Mrs. Riggs also announced a decision to lay off the employees [Ttr.135:23–136:15] and directed that the layoff be done as soon as possible [Ttr. 130:1–140:24);"[9] that it is the Respondent's position that the December 29, 2003 notice was not a change of conditions because the layoff status of the three involved employees only became more clearly defined as indefinite, and certainly this was not a significant change that would require bargaining; that these three employees had originally been notified that the date for a resumption of work, if any, was uncertain; that the question of whether the message for Payne was actually received on December 12, 2003, is largely irrelevant since he admitted knowing about the layoffs shortly after he returned home on the evening of December 12, 2003; and that the Union did not request effects bargaining until January 2004.

Was the Respondent obligated to bargain with the Union over all of the layoffs? In my opinion it was. In *Consolidated Printers*, supra, the Board, in footnote 2 at 1061 of its decision indicated as follows:

> In adopting the judge's conclusion that the Respondent did not violate Sec. 8(a)(5) when it laid off employees during the week of the election, we do not interpret the decision as requiring the General Counsel to establish the precise date the Respondent made its decision to lay off the employees. Rather, based on the facts presented, the judge reasonably concluded that the decision was made prior to the time the Respondent was obligated to bargain with the Union. We find that the record supports that inference.

The administrative law judge in *Consolidated Printers*, supra, at 1067 found as follows:

> There is no doubt that an employer's obligation under Section 8(a)(5) of the Act to refrain from making unilateral changes in working conditions commences at the time of an apparent ballot victory for a labor organization rather than at the time of its official certification. *NLRB v. Carbonex Coal Co.* 679 F.2d 200 (10[th] Cir. 1982); *Lawrence Textile Shrinking Co.*, 235 NLRB 1178 (1978). The layoff of unit employees is clearly a mandatory subject of bargaining. *U.S. Gypsum Co.*, 94 NLRB 112, 114 (1951), enfd. as modified on other grounds 206 F.2d 410 (5th Cir. 1953).
>
> The timing of a decision to lay off a particular group of employees at a particular time is critical to determining if the employer was obligated to notify and bargain about the decision or its effects. In *Valley Iron Co.*, 224 NLRB 866 (1976), the Board adopted a decision of an administrative law judge who found the employer violated Section 8(a)(5) and (1) of the Act when it laid off employees for a few days commencing immediately after the close of balloting in an election won by the union. The judge specifically found in that case that the decision to lay off the employees "was made at a time when the Union had the demonstrated support of a preponderant majority of the employees in the bargaining unit." [Id. at 877.] . . . .
>
> Turning to the instant case, I have found . . . that the Respondent determined well before the election . . . to effect . . . layoffs . . . . The record does not isolate the particular date and time of Respondent's specific determination of who would be laid off. On this record, given the close timing of the end of the balloting and the announcements of the layoffs to the employees as well as the burden of proof the General Counsel bears on each aspect of his prima facie case, it cannot be said that these decisions were made at a time when Respondent was obligated to bargain with the Union. Accordingly, I find that the layoffs initiated the week of the election were decided on by Respondent before it was obligated to bargain with the Union even though the employees were told of the layoffs and even though the layoffs did not actually begin until after the election. There being no obligation by Respondent to bargain respecting these layoffs, its failure to notify the Union respecting them does not violate Section 8(a)(5) and (1) of the Act.

The Board in *SGS Control Services*, supra, at 861 indicated as follows;

[9] R. Br. 4.

It is clear that an employer normally violates Section 8(a)(1) and (5) of the Act by unilaterally implementing, without notice to the union and affording the union an opportunity to bargain, changes in the terms and conditions of employment of its employees represented by the union. *NLRB v. Katz*, 369 U.S. 736 (1962).

However, as set forth in *Consolidated Printers*, 305 NLRB 1061, 1067, if, before becoming obligated to bargain with the union, an employer makes a decision to implement a change, it does not violate Section 8(a)(5) by its later implementation of that change.[2]

. . . . Rather, the stipulated facts establish the key point that the Respondent made its decision regarding overtime before the election.[3]

[2] In *Consolidated Printers*, supra, the judge found, and the Board agreed, that the employer had 'determined' before a union election to work employees thorough the election and then to implement a layoff. Id. at 1067. In these circumstances, the Board found that the employer had no obligation to bargain about the post election layoffs.

[3] As set forth in *Consolidated Printers*, supra, it is not essential that the precise date of the decision be established. 305 NLRB at 1061 fn. 2. The critical fact is whether the employer's decision predated the election.

In Starcraft, I do not believe that it has been shown that the employer's decision predated that election. Larry Riggs brought the involved entity into existence. He nurtured it. He financed it. He operated it. By all accounts his wife did not know about its financing. And there was no showing that she had anything to do with the operation of the Company. ALS is a neuromusclar, degenerative disease of the nerve cells that control muscular movement. It weakens a person's lungs causing a shortness of breath and eventual paralysis. But the person's mind can be as sharp as ever. Larry Riggs alone made the decision to have the December 12, 2003 layoff. He was not at the December 1 or 8, 2003 meetings in Collins' office. Patricia Riggs also was not at the December 1, 2003 meeting in Collins' office but she was at the December 8, 2003 meeting. Both Business Attorney Collins and Labor Attorney Hutson also attended this meeting, along with Heuschel, Fiorito, and Cash. Attorney Collins testified that Patricia Riggs, who had power of attorney to act for Larry Riggs, made the decision to sell the Company. Collins also testified that while a layoff was discussed, he did not recall a decision being made at this meeting to lay off employees. While the other attorney present at the December 8, 2003 meeting testified about his December 12, 2003 telephone message to Payne, Hutson did not testify about what occurred at the December 8, 2003 meeting. So neither of the professionals, both of whom were not in the room the entire time, corroborate Heuschel's testimony that Patricia Riggs announced a decision to lay off employees as soon as they could after the election or instructed management to lay off the employees. Heuschel is not a credible witness. His above-described affidavit to the Board, given closer to the events in question than his testimony at the trial herein, indicates

> Larry Riggs made the decision to conduct the December 12, 2003 layoff. The discussion of conducting a layoff was an ongoing discussion. I don't recall a particular meeting where it was decided to conduct the layoff. I have gone to Mr. Riggs' house on several occasions where we discussed the status of the Company. I don't remember the exact date when it was decided to conduct the layoff. We couldn't say anything about a layoff prior to the union vote on December 11, 2003 for fear of an unfair labor practice violation. Riggs and I discussed the layoff months ahead of time and Riggs signed the letter on December 12, 2003, the day after the union vote.

As noted above, Cash testified that the subject of layoffs was discussed by the management team with Patricia Riggs and Collins, and with "the advice of her counsel, Mrs. Riggs had instructed us that she did . . . . not want any more money borrowed to put into the company and because of that . . . . Mrs. Riggs instructed us to lay-off the staff and prepare the Company for closure or sale" (Tr. 282, 283). I have three problems with Cash's testimony. First I did not find him to be a credible witness. Second, notwithstanding his assertion that Patricia Riggs was acting on advice of counsel, her counsel did not testify that he advised and Patricia Riggs decided on December 8, 2003, to have a layoff. Third, Cash testified that the decision when to lay off the employees was made by Heuschel. Heuschel does not corroborate this. Instead, Heuschel testified that with respect to the December 12, 2003 layoff, Larry Riggs decided when to lay off the employees. Fiorito testified that there was a discussion of the need for a layoff at the December 8, 2003 meeting in Collins' office and Patricia Riggs said that she wanted to do layoffs. But Fiorito testified that Hutson said at this meeting that if the layoff was performed before the vote, it could be perceived as an unfair labor practice, and she did not recall whether a decision was made at this meeting concerning the date of the layoff; that she and the others made the recommendation to lay everyone off; and that she had made this same recommendation to Larry and Patricia Riggs on November 12 and 21, 2003. It appears that at the December 8, 2003 meeting in Collins' office there was a discussion again of laying employees off and Hutson pointed out that if there was one before the election, it might be viewed as a threat. In my opinion, no final decision was made at the December 8, 2003 meeting to have a layoff of all the employees on December 12, 2003. In my opinion, that was still Larry Riggs' sole prerogative. While Patricia Riggs was at the December 8, 2003 meeting, and according to Collins' testimony she had a power of attorney, such power of attorney was not introduced at the trial herein. Consequently, I do not know the extent of the power of attorney. I do not know exactly what powers she had. I do not know if it is a durable or nondurable power of attorney. I do not know if it was to start immediately or was springing/contingent to start after some event of incapacity. If the latter, I do not know how the incapacity is defined, and if it indeed occurred sometime before the December 8, 2003 meeting. While I am sure attorney Collins, in accord with South Carolina law, had the power of attorney notarized, witnessed by two individuals and recorded with the Register of Deeds if the durable power of attorney was to be valid after Larry Riggs incapacity, it is not clear on the record that Patricia Riggs on December 8, 2003, had the authority to decide to lay off Respondent's employees. But Attorney

Collins testified that to his knowledge Patricia Riggs did not decide on the layoff on December 8, 2003. Patricia Riggs did not testify and so her understanding of what happened at the meeting in Collins' office on December 8, 2003, is not a matter of record. While counsel for the General Counsel requests an adverse inference, the fact that she did not take the time to testify 11 days before her husband died after a prolonged illness is understandable. It is clear from the evidence of record, however, that Larry Riggs told Heuschel what to write in the December 12, 2003 layoff notice, that Larry Riggs signed the notice, that Heuschel did not act until he had the signed notice from Larry Riggs, that Heuschel did not wait until the end of the shift because Larry Riggs told him to act as soon as possible, and that Heuschel realized that Larry Riggs, and not Patricia Riggs, made the decision to have the December 12, 2003 layoff. Larry Riggs was calling the shots. It was his "baby" and he was still capable of deciding its fate, at least with respect to its interaction with its employees regarding the Union. To still be struggling, in his condition with the disease he was fighting, to try to resolve what was figuratively on his plate, Larry Riggs had to be one tough gentleman who cared about his business with a passion. I can understand how Larry Riggs was upset with the outcome of the election. He and his Company were hurting. From his point of view, his employees, whom he believed he had treated fairly, chose a union over him even though he made a personal plea to them. While the reasoning for what he did is obvious, it is not legally acceptable. In my opinion it has not been shown that there was a decision or determination on December 8, 2003, to have a layoff of all of the Respondent's employees on December 12, 2003. In my opinion, the decision was made by Larry Riggs after the election on December 11, 2003. Only then could he be sure that a majority of the technicians chose the Union.[10] Larry Riggs' decision was memorialized on the morning of December 12, 2003. The Respondent did not even attempt to contact the Union until after the decision was made. Accordingly, the Respondent violated Section 8(a)(5) of the Act by not giving the Union notice and an opportunity to bargain before the temporary layoff decision was made. Similarly, the Respondent violated Section 8(a)(5) of the Act by not giving the Union notice and an opportunity to bargain before the December 29, 2003 permanent layoff decision was made.

Has the Respondent demonstrated that its conduct was an economic necessity? I do not believe that Respondent has demonstrated this to be the case. In my opinion, the Respondent violated Section 8(a) (1) and (3) with the temporary and permanent layoffs. While, as indicated above, I believe that the Company was hurting financially in December 2003, it had been hurting financially for some time. Perhaps the condition had worsened. But I do not believe that it has been shown that it had worsened to the point that the action taken on December 12, 2003, was justified solely by the economics of the situation. There was no lawful justification for laying off all the employees, without prior warning to the Union, even before the end of the involved shift, other than Larry Riggs' dictate to do it as soon as possible. On December 12, 2003, the Respondent had production work to be done. Indeed, it missed deadlines on the seats and had to recall employees well in advance of the specified recall date. Even then it had trouble meeting the production demands with respect to the seats and had to call McMillan in to do additional training. At the same time it did not recall permanent employee Hoekstra who was qualified to work on seats. Hoekstra's testimony on this point is credited. Heuschel is not a credible witness. And the Respondent did not call the other individuals named by Hoekstra who could attest to the fact that he had the training notwithstanding the fact that his signed-off training documentation was not in the file produced by the Respondent at trial. The Respondent was still in business at the time of the trial herein, months after the temporary and permanent layoffs. Indeed shortly before the trial herein the Respondent hired another temporary employee to work on navigational switching units, work that Rabon could have performed. Rabon had earlier turned down Respondent's recall offer of a part-time job. The Respondent, however, did not indicate that the navigational switching unit job was part time. Perhaps there may have been an economic justification on or about December 12, 2003, for the layoff of some employee(s). If the Respondent had given the Union notice and an opportunity to bargain over a layoff and the effects of a layoff, perhaps it could have been determined that a layoff could have been somehow avoided or if one was necessary, it could have been limited. Instead, the Respondent acted at its peril. Instead, the Respondent, without any prior warning to the Union, laid off all the employees before their shift even ended on December 12, 2003. Larry Riggs reacted to the employees' choice. More to the point, Larry Riggs retaliated because his employees chose the Union over him. The temporary and permanent layoffs violated Section 8(a)(1) and (3) of the Act.

[10] While a majority of technicians wore union hats on December 10, 2003, and this was witnessed by management, Larry Riggs could not be completely sure that all of those wearing the Union hats would ultimately check their secret ballot off for the Union.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By engaging in the following conduct Respondent committed unfair labor practices contrary to the provisions of Section 8(a)(1) of the Act.

(a) Interrogating an employee about his union activities.

(b) Threatening employees by informing them that the Employer's lease would be terminated if the employees selected the Union as their collective-bargaining representative.

(c) Threatening employees with loss of business if the employees selected the Union as their collective-bargaining representative.

(d) Threatening employees with job loss if the employees selected the Union as their collective-bargaining representative.

4. By engaging in the following conduct Respondent committed unfair labor practices contrary to the provisions of Section 8(a)(1) and (3) of the Act.

(a) Temporarily laying off Elmo Blackman, Trey Elzy, Albert Kamradt, Gary Lyles, Clarence Parks, John Rabon, Anthony Raper, and Eric Hoekstra on December 12, 2003.

(b) Permanently laying off Elmo Blackman, John Rabon, and Eric Hoekstra on December 29, 2003, and thereafter failing and refusing to reinstate them.

5. By engaging in the following conduct Respondent committed unfair labor practices contrary to the provisions of Section 8(a)(1) and (5) of the Act.

(a) Temporarily laying off Elmo Blackman, Trey Elzy, Albert Kamradt, Gary Lyles, Clarence Parks, John Rabon, Anthony Raper, and Eric Hoekstra on December 12, 2003, without prior notification to or consultation with the Union.

(b) Permanently laying off Elmo Blackman, John Rabon, and Eric Hoekstra on December 29, 2003, without prior notification to or consultation with the Union, and thereafter failing and refusing to reinstate them.

6. The following employees of Respondent constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time technicians employed by Respondent at its Greenville, South Carolina, facility, excluding all other employees, office clerical employees and professional employees, guards and supervisors as defined in the Act.

7. At all times since December 11, 2003, and continuing to date, the Union has been the representative for the purpose of collective bargaining of the employees in the unit described above, and by virtue of Section 9(a) of the Act, has been, and is now, the exclusive representative of the employees in the unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

8. The above-described labor practices affect commerce within the contemplation of Section 2(6) and (7) of the Act.

9. Respondent has not committed any other unfair labor practices alleged in the complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily laid off the above-described employees, it must offer recall to Elmo Blackman, John Rabon, and Eric Hoekstra to their former jobs of if those jobs no longer exist, to substantially equivalent positions, and make all of the temporarily and permanently laid off employees whole for any loss of earnings and other benefits, computed on a quarterly basis from date of their layoff to date of a proper offer of recall, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The Respondent, Starcraft Aerospace, Inc., of Greenville, South Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their union activities.

(b) Threatening employees by informing them that the Employer's lease would be terminated if the employees selected the Union as their collective-bargaining representative.

(c) Threatening employees with loss of business if the employees selected the Union as their collective-bargaining representative.

(d) Threatening employees with job loss if the employees selected the Union as their collective-bargaining representative.

(e) Temporarily laying off Elmo Blackman, Trey Elzy, Albert Kamradt, Gary Lyles, Clarence Parks, John Rabon, Anthony Raper, and Eric Hoekstra on December 12, 2003, because they joined, supported, or assisted the Union, and engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and in order to discourage employees from engaging in such activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

(f) Permanently laying off Elmo Blackman, John Rabon, and Eric Hoekstra on December 29, 2003, and thereafter failing and refusing to reinstate them because they joined, supported, or assisted the Union, and engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and in order to discourage employees from engaging in such activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

(g) Temporarily laying off Elmo Blackman, Trey Elzy, Albert Kamradt, Gary Lyles, Clarence Parks, John Rabon, Anthony Raper, and Eric Hoekstra on December 12, 2003, without prior notification to or consultation with the Union.

(h) Permanently laying off Elmo Blackman, John Rabon, and Eric Hoekstra on December 29, 2003, without prior notification to or consultation with the Union, and thereafter failing and refusing to reinstate them.

(i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

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[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

All full-time and regular part-time technicians employed by Respondent at its Greenville, South Carolina, facility, excluding all other employees, office clerical employees and professional employees, guards and supervisors as defined in the Act.

(b) Within 14 days from the date of the Board's Order, offer Elmo Blackman, John Rabon, and Eric Hoekstra recall to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make Elmo Blackman, Trey Elzy, Albert Kamradt, Gary Lyles, Clarence Parks, John Rabon, Anthony Raper, and Eric Hoekstra whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful layoffs and within 3 days thereafter notify the employees in writing that this has been done and that the layoffs will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Greenville, South Carolina copies of the attached notice marked "Appendix."[12] Copies of the Notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where Notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the Notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the Notice to all current employees and former employees employed by the Respondent at any time since November 2003.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. July 7, 2004

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interrogate you about your union activities.

WE WILL NOT threaten you by telling you that our lease would be terminated if you select International Association of Machinists and Aerospace Workers, AFL–CIO as your collective-bargaining representative.

WE WILL NOT threaten you with loss of business if you select International Association of Machinists and Aerospace Workers, AFL–CIO as your collective-bargaining representative.

WE WILL NOT threaten you with job loss if you select International Association of Machinists and Aerospace Workers, AFL–CIO as your collective-bargaining representative.

WE WILL NOT temporarily or permanently lay you off because you join, support, or assist International Association of Machinists and Aerospace Workers, AFL–CIO, and engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and in order to discourage you from engaging in such activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

WE WILL NOT temporarily or permanently lay you off without prior notification to or consultation with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time and regular part-time technicians employed by Respondent at its Greenville, South Carolina, facility, excluding all other employees, office clerical employees and professional employees, guards and supervisors as defined in the Act.

WE WILL within 14 days from the date of the Board's Order, offer recall to Elmo Blackman, John Rabon, and Eric Hoekstra to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Elmo Blackman, Trey Elzy, Albert Kamradt, Gary Lyles, Clarence Parks, John Rabon, Anthony Raper, and Eric Hoekstra whole for any loss of earnings and other benefits resulting from their layoffs, less any interim earnings, plus interest.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful layoffs and WE WILL, within 3 days thereafter notify the employees in writing that this has been done and that the layoffs will not be used against them in any way.

STARCRAFT AEROSPACE, INC.